90-1764

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, et al.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, et al.,
Respondents.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1927

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,	*	FILED Dec. 6, 1990 Robert D. St. Vrain Clerk
v.	*	
INDEPENDENT FRUIT AND PRODUCE CO., a Missouri corporation, Appellee.	*	

No. 89-1928

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,	*	Appeals from the United States District Court for the Eastern District of Missouri.
v.	*	
WALTER A. RUBIN, d/b/a M.J.M. PRODUCE EXCHANGE, Appellee.	*	

No. 89-1929

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SUGAR RIPE BANANA COMPANY,
Appellee.

No. 89-1933

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

N.E. FRIEDMEYER-SELLMEYER, DISTRIBUTING COMPANY,
Appellee.

No. 89-1934

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SALVATORE PUPILLO, d/b/a PUPILLO FRUIT COMPANY,
Appellee.

No. 89-1935

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GEORGE A. HEIMOS PRODUCE COMPANY, INC.,
Appellee.

No. 89-1936

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

WILLIAM MANTIA FRUIT COMPANY, INC.,
Appellee.

No. 89-1937

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ST. LOUIS BANANA AND TOMATO COMPANY, INC.,
Appellee.

No. 89-2204

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

LAMPERSON FRUIT & PRODUCE COMPANY, Appellee.

No. 89-2205

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

LOMBARDO FRUIT AND PRODUCE COMPANY, Appellee.

No. 89-2206

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

JOHN MOON PRODUCE COMPANY,
Appellee.

No. 89-2207

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

STANLEY PRODUCE, INC.,
Appellee.

No. 89-2208

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ROBERT JOHNSON, d/b/a J. JOHNSON, FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2209

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ADOLPH A. SOLOMON AND IRL S. SOLOMON, STATUTORY TRUSTEES FOR ADOLPH & CERESIA PRODUCE CO.,
Appellees.

No. 89-2210

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

UNITED FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2438

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GOLDMAN FRUIT & PRODUCE CO., INC.,
Appellee.

No. 90-1160

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

JULES J. SCHWARTZ AND JOSEPH F. SCHWARTZ, d/b/a NEW MARKET PRODUCE COMPANY,
Appellees.

No. 90-1161

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

FRANKLIN PRODUCE COMPANY, a Missouri Corporation,
Appellee.

No. 90-1162

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

MARSKE PRODUCE COMPANY, INC.,
Appellee.

No. 89-2839

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellee,

v.

GEORGE A. HEIMOS PRODUCE CO., INC.,
Appellant.

No. 89-2840

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellee,

v.

N.E. FRIEDEMEYER-SELLMEYER DISTRIBUTING COMPANY,
Appellant.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and cause is remanded to the district court for proceedings consistent with the opinion of this Court.

The judgment of the district court denying the employers' request for attorneys fees is affirmed.

December 6, 1990

ORDER ENTERED IN ACCORDANCE WITH OPINION
/s/
Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1927

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,	*	
Appellants,	*	
v.	*	
Independent Fruit and Produce Co., a Missouri corporation,	*	
Appellee.	*	

No. 89-1928

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,	*	
Appellants,	*	Appeals from the United States District Court for the Eastern District of Missouri.
v.	*	

Walter A. Rubin, d/b/a M.J.M. Produce Exchange,

Appellee.

No. 89-1929

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Sugar Ripe Banana Company,

Appellee.

No. 89-1933

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

N. E. Friedmeyer-Sellmeyer, Distributing Company,

Appellee.

No. 89-1934

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Salvatore Pupillo, d/b/a Pupillo Fruit Company,

Appellee.

No. 89-1935

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

George A. Heimos Produce Company, Inc.,

Appellee.

No. 89-1936

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

William Mantia Fruit Company, Inc.,

Appellee.

No. 89-1937

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

St. Louis Banana and Tomato Company, Inc.,

Appellee.

No. 89-2204

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Lamperson Fruit & Produce Company,

Appellee.

No. 89-2205

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Lombardo Fruit and Produce Company,

Appellee.

No. 89-2206

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

John Moon Produce Company,

Appellee.

No. 89-2207

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Stanley Produce, Inc.,

Appellee.

No. 89-2208

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Robert Johnson, d/b/a J. Johnson, Fruit & Produce Company,

Appellee.

No. 89-2209

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Adolph A. Solomon and Irl S. Solomon, statutory trustees for Adolph & Ceresia Produce Co.,

Appellees.

No. 89-2210

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

United Fruit & Produce Company,

Appellee.

No. 89-2438

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Goldman Fruit & Produce Co., Inc.,

Appellee.

No. 90-1160

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Jules J. Schwartz and Joseph F. Schwartz, d/b/a New Market Produce Company,

Appellees.

No. 90-1161

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Franklin Produce Company, a Missouri Corporation,

Appellee.

No. 90-1162

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Marske Produce Company, Inc.,

Appellee.

No. 89-2839

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellee,

v.

George A. Heimos Produce Co., Inc.,

Appellant.

No. 89-2840

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellee,

v.

N. E. Friedmeyer-Sellmeyer Distributing Company,

Appellant.

Submitted: September 10, 1990

Filed: December 6, 1990

Before FAGG and BEAM, Circuit Judges and WOODS,* District Judge.

BEAM, Circuit Judge.

In this consolidated appeal, Central States, Southeast and Southwest Areas Pension Fund (Central States) appeals from judgments entered in favor of defendants-employers. Pursuant to sections 502 and 515 of the Employee Retirement Income Security Act, 29 U.S.C. §§1132, 1145 (1988), Central States brought separate actions against more than twenty independent produce wholesalers to collect delinquent

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* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

pension contributions. Central States contended that the produce companies failed to make pension contributions on behalf of certain employees as required by the governing collective bargaining agreements. Central States argued that these employees, whose questionable status was discovered in an audit, were regular employees for whom contributions were due. The employers, however, classified these employees as "casuals" for whom contributions were not required by the collective bargaining agreements. The district court found that the collective bargaining agreements were ambiguous and looked to the intent and past practice of the parties to define "casual employee." The district court held that a "casual employee" is not necessarily a person who works only intermittently or sporadically, as Central States thought, but, instead,

includes those employees so designated by the employer, with the consent of the union, regardless of their work schedules. Accordingly, the district court found no contributions owing and entered judgment for defendants. We reverse.1/

1/ We have added to this consolidated appeal on the merits the consolidated appeal of George A. Heimos Produce Company and N.E. Friedmeyer-Sellmeyer Distributing Company, Nos. 89-2839 and 89-2840, which seek reversal of the district court's denial of their request for attorneys' fees. In its order of October 6, 1989, the district court held that the employers were not entitled to attorneys' fees because "there is no evidence of bad faith on the part of plaintiffs and plaintiffs' legal position was not frivolous." Given that we reverse on the merits, the district court clearly did not abuse its discretion in so ruling, and no separate opinion in the attorneys' fees appeal is warranted.

I. BACKGROUND

Due to their physical proximity on several city blocks in St. Louis, the defendants-employers in these cases, members of the St. Louis Fruit and Produce Association, are collectively known as Produce Row. Most are independently owned, family-run companies, wholesaling fresh fruits and vegetables to small, independent grocers. Central States is an employee benefit fund as defined by ERISA. See 29 U.S.C. §1002. Central States, which is headquartered in Chicago, receives more than 5,000 collective bargaining agreements for review each year, covering more than 250,000 active participants and 125,000 retired participants. In this case, contributions to the pension fund are governed by collective bargaining agreements negotiated by the employers

and Local 688 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The collective bargaining agreements at issue cover the years 1973 through 1988 and are dated 1973, 1976, 1979, 1982 and 1985. Because they contain similar provisions on casual employees, the agreements dated before 1982 can be conveniently considered together. The pre-1982 agreements provide in Article IX that casual employees are to be hired subject to need, that their hiring cannot increase "the normal then existing number of working employees," that casuals cannot work more than eighty hours per month, and that casuals are to be used as replacements for regular employees. Article IX was renegotiated in 1982 so that many of these restrictions on the use of casuals were eliminated. Generally, however,

all relevant agreements provide that casual employees receive neither fringe benefits nor seniority. At issue is not whether casuals are entitled to benefits, but, rather, which employees are casuals.

The dispute over the meaning of "casual employee" arose from a random audit in October 1983 of Lamperson Fruit and Produce Company. As a result of the audit, which covered September 28, 1980, to September 24, 1983, Central States claimed that Lamperson owed $73,034 for "'non-reporting of eligible Plan Participants.'" Central States, Southeast & Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distrib. Co., No. 84-1669 C (5), slip op. at 6 (E.D. Mo. Apr. 28, 1989). In its audit, Central States discovered employees who worked more or less full-time during the

audit period but whom Lamperson classified as casuals. Because it understood casuals to be employees who worked only sporadically or intermittently as needed, Central States contended that these employees were regulars for whom contributions were due. In the resulting action to collect delinquent contributions, Central States requested audits of the Produce Row employers.

On January 16, 1985, the Chief Judge of the Eastern District of Missouri designated the case against Friedmeyer-Sellmeyer Distributing Company as "the most suitable case to try, brief and decide as a guide in the ultimate trying, briefing and decision

in all of the above cases."[2/] Appellants' App. at 255. On January 12, 1987, the district court ordered defendant Friedmeyer-Sellmeyer to submit to an audit of its personnel records from December 28, 1980, to December 31, 1983. Central States, Southeast & Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distrib. Co., 650 F. Supp. 978, 980 (E.D. Mo. 1987). The audit was later expanded to cover the years 1979 to 1986. It revealed seven employees who worked essentially full-time for some if not all of the audit period. "[T]he audit report . . . revealed that six of the seven employees

---

2/ The cases were originally assigned to four judges in the Eastern District of Missouri. Following entry of judgment in the Friedmeyer-Sellmeyer case, judgments for defendant-employers were entered in the other pending cases. This consolidated appeal follows.

included in the report worked virtually every week for over one year and one of these individuals worked all but two weeks during a period of nearly six years." Brief for Appellant at 16. William Kauck, who conducted the audit of Friedmeyer-Sellmeyer, testified that the audit revealed "an inordinate use of what the employer was calling 'casual employees.'" Trial Transcript vol. 1, at 127. As a result of the audit, Central States claimed that Friedmeyer-Sellmeyer owed $24,774 in delinquent contributions.

At the bench trial, Friedmeyer-Sellmeyer contended that its use of casual employees was consistent with the collective bargaining agreements, that no dispute or misunderstanding about casuals existed between the employer and the union, that

none of the casuals were confused about their status as casuals, and that the only party complaining was Central States. The evidence established that it was standard practice for the Produce Row employers to initially hire all employees as casuals, some of whom might laster become regulars upon a vacancy. Trial Transcript vol. 2, 67, 80, 147, 214. Several witnesses testified that the casuals knew of their status when hired, id. at 99, 116, 163, and that no one "other than Central States ever questioned which employees were casuals versus regulars." Id. at 163. Casuals were casuals merely because they were hired as casuals and because they received no benefits. Id. at 62, 64, 199.

The evidence is also clear, however, that casuals did the same work as

regulars and in some cases worked as many hours as regulars. The testimony of Douglas Brand, the secretary-treasurer of United Fruit and Produce Company, is typical:

> Q: Do they have the same hours at work?
>
> A: They may.
>
> Q: They work full time?
>
> A: They may.
>
> Q. Any difference in the hours of a casual or regular?
>
> A: Not that I know of.

Id. at 109. Central States argued to the district court that these facts

proved its case: that given the standard meaning of "casual employee" -- someone who works sporadically or intermittently as needed -- used in the collective bargaining agreement, those employees denominated casuals who worked as many hours as regular employees for a year or more were in fact regular employees.

The district court disagreed with Central States that the term "casual employee" in the collective bargaining agreement meant only those employees who worked sporadically or intermittently. Rather, the district court found the contract term to be ambiguous, and, after examining past hiring practices on Produce Row, held that the collective bargaining agreements had not been violated. "Quite simply, the Produce Row employers acted exactly as they

agreed -- they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees." Friedmeyer-Sellmeyer, slip op. at 10. In essence, the district court held that by "casual employee" the collective bargaining agreement meant whomever the employer so designated. This appeal concerns the correctness of that decision in the context of ERISA.

II. DISCUSSION

Central States brought these actions pursuant to section 515 of ERISA, which provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the

> terms and conditions of such plan or such agreement.

29 U.S.C. §1145. It is clear that this section "creates a federal right of action independent of the contract on which the duty to contribute is based." Bituminous Coal Operators' Ass'n v. Connors, 867 F.2d 625, 633 (D.C. Cir. 1989). It is equally clear that Congress intended that this section would simplify actions to collect delinquent contributions, avoid costly litigation, and enhance the actuarial planning necessary to the administration of multiemployer pension plans. See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., 870 F.2d 1148, 1152 (7th Cir. 1989).

Prior to the enactment of section 515 in 1980, collection actions brought

by plan trustees were often converted into complex and costly litigation involving various contract formation defenses. Id. at 1152-53. Collection actions result in lower benefits and higher contributions rates not only because of this cost, but also because any shortfalls in contributions skewer the pension fund's actuarial planning.

> The actuarial calculations that produce the contribution and payout systems are based on the supposition that the funds will receive full contributions on behalf of all employees covered. If a local union and an employer try to shrink the duty to contribute without notice to the funds and a contraction of the funds' obligations, the fund may end up paying benefits without corresponding contributions.

Robbins v. Lynch, 836 F.2d 330, 333 (7th Cir. 1988).[3/] See also Central States, Southeast & Southwest Areas Pension Fund v. Behnke, Inc., 883 F.2d 454, 460 (6th Cir. 1989); Gerber, 870 F.2d at 1154-55; Connors, 867 F.2d at 633. Central States claims, for precisely these reasons, that it would not have accepted the plans from Produce Row for participation had it known of the

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3/ The importance of this rationale does not depend on whether any of those employees whom Central States regards as regulars, but whom the employers regard as casuals, actually files a claim against Central States for benefits. "[P]ension and welfare plans are insurance vehicles. Insurers depend on receiving contributions from persons who collect far in the future or not at all." Gerber, 870 F.2d at 1154. What matters is not whether the employees at issue ever attempt to collect, but that without contributions from those whom Central States claims are regulars according to the terms of the collective bargaining agreement, its actuarial assumptions are unsound. See id.

employers' definition of "casual employee." "Because of the actuarial detriment inherent in arrangements that limit contributions to only those employees that are likely to receive benefits, the Pension Fund prohibits the participation of employers who split the bargaining unit for the purpose of pension coverage." Brief for Appellant at 26.[4]

---

[4] Casuals were not union members until 1982. Trial Transcript vol. 2, 71, 117. Indeed, casuals were distinquishable from union employees in part because they did not wear union buttons. Id. at 63. Nevertheless, the parties seemed to agree at oral argument that casuals were part of the bargaining unit and that the union acquiesced in their exclusion from pension benefits. The district court rejected any argument based on splitting the bargaining unit, and no such argument has been made on appeal.

Section 515 deals with these concerns by placing a pension fund in a better position than that which it would otherwise occupy in relation to the collective bargaining agreement. Because a pension fund is not a party to the collective bargaining agreement, it would normally be a third party beneficiary of it. Behnke, 883 F.2d at 460; Connors, 867 F.2d at 632; Robbins, 836 F.2d at 333; Southwest Adm'rs, Inc. v. Rozay's Transfer, 791 F.2d 769, 773 (9th Cir. 1986), cert. denied, 479 U.S. 1065 (1987). As a third party beneficiary, however, the pension fund would be subject to "any contract defense which the promisor could assert against the promisee if the promisee were suing on the contract." Rozay's Transfer, 791 F.2d at 773. It is these contract defenses--for example, fraud in the inducement, oral side agreements or

course of performance--that are most likely to breed litigation. Gerber, 870 F.2d at 1154. As a result, the courts find that section 515 places the pension fund in a better position, analogous to that of a holder in due course or a receiver of a failed bank--"entitled to enforce the writing without regard to understandings or defenses applicable to the original parties." Id. at 1149. See also Benson v. Brower's Moving & Storage, 907 F.2d 310, 314 (2d Cir. 1990); petition for cert. filed, 59 U.S.L.W. 3278 (Sept. 26, 1990); Robbins, 836 F.2d at 333; Rozay's Transfer, 791 F.2d at 773. "If it means nothing else, section 515 means that . . . suit [by a trustee] cannot be thwarted by defenses not apparent from the face of the Agreement." Connors, 867 F.2d at 634. The courts of appeals have been unanimous in so holding. See, e.g.,

Berry v. Garza, No. 89-1651, slip op. at 4-5 (8th Cir. Nov. 15, 1990) (rejecting defense based on lack of majority status); Benson, 907 F.2d at 314-15 (rejecting defenses of abandonment of contract and lack of majority representation); Gerber, 870 F.2d at 1150-51 (rejecting defense based on oral agreement between the parties not to enforce the written terms of the collective bargaining agreement as to some employees); Robbins, 836 F.2d at 333-34 (rejecting as defense claim that union had agreed not to collect a payment called for by the agreement); Rozay's Transfer, 791 F.2d at 775 (rejecting claim that promise to make contributions was fraudulently induced); Southern California Retail Clerks Union & Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262, 1265-66 (9th Cir. 1984) (same). In sum,

the courts recognize only two defenses to a collection action: that the pension contributions are themselves illegal or that the collective bargaining agreement is void. Benson, 907 F.2d at 314.

Through section 515, Congress has decided that a pension fund is entitled to "assume that all participants in a plan are following the stated terms; no other approach permits accurate actuarial computations and proper decisions about which claims to pay." Robbins, 836 F.2d at 333 (emphasis added). Thus, whether the employer and union agree in this case that they knew what they meant by "casual employee" is irrelevant if the written agreement unambiguously expresses something other than what they intended. Absent ambiguity in the written agreement, the

claims of the Produce Row employers are little different from a side agreement made with the union not to disclose their true intention to the pension plan. Absent ambiguity, it is clear that the employers in this case do not assert a defense apparent from the face of the agreements.

The district court considered the provisions of four collective bargaining agreements, from 1973, 1976, 1979 and 1982. Because the three agreements prior to the 1982 agreement contain similar provisions pertaining to casual employees, the district court referred only to the 1979 and the 1982 agreements. Casual employees are covered in Article IX of the 1979 agreement, which provides:

> Employer may hire, subject to need, persons who will be known as "casual

> employees (casuals)." Such casuals may be used as follows and subject to the conditions listed:
>
> 1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.
>
> 2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.
>
> . . . .
>
> 4. Fringe benefits shall not be paid on account of casuals . . . and no seniority shall be acquired by such casuals.
>
> . . . .
>
> 6. Casuals may be used to replace regular employees who are absent for any reason . . . provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists.

Article IX was changed in the 1982 collective bargaining agreement by eliminating several of the restrictions on the use of casual employees. It still provides that "the Employer may

hire, subject to need, persons who will be known as 'casual employees' (casuals)." Similarly, it still provides that casual employees are not entitled to fringe benefits, although it does provide for a separate seniority list for casuals. The provisions restricting hours and hiring such that the "normal then existing number of working employees" is not thereby increased, however, are absent.

Without reference to these differences between the pre-1982 and 1982 agreements, the district court found that "casual employees are specifically defined in the CBAs." Friedmeyer-Sellmeyer, slip op. at 4. Despite its reference to the specific definition, however, the district court found that "[t]he use of the term 'casual employee' in these agreements

creates an ambiguity that requires the Court to apply . . . rules of construction." Id. at 8-9. We disagree that any of the agreements are ambiguous.

As with any contract, whether a collective bargaining agreement is ambiguous is a question of law subject to de novo review. Ehrhardt v. Penn Mut. Life Ins. Co., 902 F.2d 664, 667 (8th Cir. 1990), cert. denied, 111 S. Ct. 152 (1990); Lehman Bros. Kuhn Loeb v. Clark Oil & Ref., 739 F.2d 1313, 1317 (8th Cir. 1984), cert. denied, 469 U.S. 1158 (1985). The law is clearly established in this circuit that a contract is ambiguous only if it is reasonably susceptible of more than one construction. Ehrhardt, 902 F.2d at 667; Lehman Bros. 739 F.2d at 1317; Universal Towing Co. v. United Barge Co., 579 F.2d 1098, 1101 (8th Cir.

1978). In ascertaining whether a contract is reasonably susceptible of more than one construction, words are to be given their plain and ordinary meaning as understood by a reasonable, average person. NLRB v. Superior Forwarding, Inc., 762 F.2d 695, 697 (8th Cir. 1985); Lehman Bros., 739 F.2d at 1317; Universal Towing, 579 F.2d at 1101. Recourse to the ordinary, dictionary definition of words is not only reasonable, but may be necessary. See Conoco v. Norwest Bank, 767 F.2d 470, 471 (8th Cir. 1985).

Given that the provisions on casual employees in the pre-1982 agreements differ from those in the 1982 agreement, we must consider the agreements separately. Beginning with the pre-1982 agreements, we find no ambiguity. The dictionary contains a standard definition of "casual employment:"

> Employment at uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor does he normally receive fringe benefits.

Black's Law Dictionary 198 (5th ed. 1979). The auditors for Central States who testified before the district court said that their understanding of "casual employee" was consistent with this definition. Joel Ahrens testified that "[w]e have an understanding or we use an assumption, I guess you would call it, in -- for casual employees, we assume that a casual employee is not an employee who is going to work with any great regularity." Trial Transcript vol. 1, at 52-53. William Kauck also testified that he had a general understanding that a "casual employee" worked on a sporadic or infrequent

basis, id. at 139, and that his understanding was consistent with the Central States field audit manual. Id. at 147-48. Ahrens further testified that Central States had a general understanding of "casual," id. at 64, and contrasted the employers' use of "casual" with a contract provision providing that people labeled "blue hats" would not receive pension benefits but all other employees would. Ahrens said that in that instance, "[w]e would want to know what a 'blue hat' is. I don't know what a 'blue hat' is." Id. at 63. By implication, Ahrens suggested that if the employers meant by "casual employee" something other than its dictionary definition -- indeed, something contrary to its dictionary definition -- they could have said so. Central States merely presumed that

"casual employee" was used consistently with its dictionary definition.

The record makes clear that Central States thought it knew what the employers meant by "casual employee" because of that term's common meaning. It is also clear that Central States thought the restrictive provisions dealing with casuals contained in the pre-1982 agreements confirmed its understanding. We agree that the restrictive provisions in the 1979 agreement are consistent with the dictionary definition of "casual employee." Kauck testified that he understood the language "subject to need" in Article IX, section 2 and the limitation found in subsection 1, that "casuals may be hired where the normal then existing number of working employees is not thereby increased," to

be consistent with his understanding that casuals worked sporadically as needed or as replacements. With reference to subsection 1, Kauck testified that "this particular provision says that -- actually a casual can be used on a replacement basis. In other words, a regular employee can be off; they hire a casual employee to take his place for that time that he's off. And the normal then existing number of employees isn't increased." Id. at 141. Similarly, we think that the limitation on the number of hours to be worked by casuals found in subsection 2, and the provision in subsection 6 that casuals are to replace regular employees when absent, also support the standard meaning of "casual employee." Contrary to the assertion of the employers that "casual employee" is not defined in any of the agreements but is merely subject

to various conditions, we think that these conditions help to define the term and do so consistently with the dictionary definition. From the face of the written documents, the pre-1982 agreements are not ambiguous.

It is also clear from the record before the district court that the hiring practices of Produce Row employers did not conform to this unambiguous definition in the pre-1982 agreements. As indicated, several witnesses for the employers testified that it was standard practice to hire all employees as casuals; only some would later become regulars. As for the restrictions in the pre-1982 agreements, the witnesses testified that the agreements were simply ignored. Brand testified that the practice of United Fruit and Produce under the 1979

agreement was to hire casuals even when that hiring increased the number of then existing working employees. Trial Transcript vol. 2, at 129-30. When asked whether be thought that such a practice violated the agreement, he agreed: "If you want to use what's on the paper here, yes." Id. at 130. Vincent Vogler, the lawyer who represented the employers in the negotiations culminating in the 1982 agreement, testified that the employers in 1979 had no idea what section two of Article IX meant. Id. at 208. He testified that subparagraph 1 "was not followed in past practices down there," and "was being totally ignored." Id. The hour limitation in subparagraph 2 was similarly ignored, id. at 209, as was subparagraph 6. "The facts are the past practices indicate that that formula and that procedure just wasn't

going on." Id. at 215-16. Thus, not only were the pre-1982 agreements unambiguous, their terms were also ignored. The employers contend, however, that this evidence proves that the pre-1982 agreements did not reflect their actual intent, which is made clear by the changes in the 1982 agreement.5/

5/ The district court agreed with this argument. While acknowledging that some of the provisions in the pre-1982 agreements were not followed, Friedmeyer-Sellmeyer, slip op. at 9, the court suggested that they were "merely an aberration from the time-honored tradition and practice of using casuals heavily during the peak periods and slacking off when there was less work to be performed." Id. Hence, the court agreed with the employers that the 1982 agreement was merely "corrected" to reflect "the clear intention of the parties to the bargaining agreement." Id. As indicated below, we think that this analysis ignores both the purpose of written agreements and section 515.

This argument, however, has little to do with whether the written agreement is unambiguous. Given the dictionary definition of "casual employment," we disagree that the 1982 collective bargaining agreement was ambiguous. Even though several of the restrictions found in the 1979 agreement were deleted from the 1982 agreement, the parties retained the term "casual employee." In effect, they argue that by removing these restrictions from the 1982 agreement they gave a term a meaning contrary to its dictionary definition, and that they were not obligated to say so. Agreements are written purposely to avoid such a situation. "While interpreting contract language is not always easy, sticking to the words the parties actually used limits substantially the bounds of legitimate disagreement." Morta v. Korea Ins.

Corp., 840 F.2d 1452, 1459 (9th Cir. 1988). Were parties to a contract able to alter the usual definition of an unambiguous, written term by reference to their past practices or their own private agreement, reason could not justify the written word.

In essence, the employers argue that "casual employee" means anyone so intended by the employer and the union, even if contrary to the plain meaning of "casual employee" in the written agreement. In TKO Equip. Co. v. C & G Coal Co., 863 F.2d 541 (7th Cir. 1988), the Seventh Circuit considered a situation in which a security agreement was written as a lease but contended by the parties to be a sale. The court held that if the parties meant for their agreement to be a sale, they should have said so.

> If [the parties] wish the symbols "one Caterpillar D9G tractor" to mean "500 railroad cars full of watermelons", that's fine -- provided parties share this weird meaning. A meaning held by one party only may not be invoked to change the ordinary denotation of a word, however. Intent must be mutual to be effective; unilateral intent does not count. Still less may the parties announce that they "share" an unusual meaning to the detriment of strangers, who have no way of finding out what was in the contracting parties' heads.

Id. at 545 (citation omitted). The employers in this case argue the contrary, that Central States is merely attempting to ascribe to "casual employee" its own meaning, not the meaning intended by the union and the employers, and that Central States cannot do this. "Central States does not have the right to pull up a chair to the bargaining table, long after the bargain has been struck, and tell the employer that the agreement he signed

years ago means something other than that which the employer and union intended." Brief for Appellee at 23. Section 515, however, requires that what the parties to the bargaining agreement intended must be made clear from its face.

That intention was not clear in this case, and the testimony at trial confirms that the employers knew both that the meaning they attached to "casual employee" in the written agreements was unusual, and that Central States could not ascertain their meaning from the documents. When asked how a third party like Central States would be able to ascertain the status of casual employees under the 1979 agreement, Charles Gallagher, president of United Fruit and Produce Company, responded, "I couldn't tell you how they go to

ascertain them." Trial Transcript vol. 2, at 90. While Vincent Vogler suggested that the parties had defined casuals by exclusion, i.e. a casual is anyone not a regular, id. at 226, Douglas Brand acknowledged that no definition of "regular employee" exists in the agreements. Id. at 150. More emphatically, however, Brand went on to acknowledge that the parties gave to "casual employee" an unusual meaning.

> Q: [W]hat you're telling me is that you use the English language other than in the standard form.
>
> A: In our case, yes.
>
> Q: You had unique -- you used words like "casual" and gave it a unique definition; isn't that true?
>
> A: We didn't give a unique definition. Our term, "casual," means something similar to laborer. This

> contract was bought from an existing contract many, many years ago that had the word "casual" in it. The word "casual" in our business does not fit the word "casual" in your terms.
>
> . . . .
>
> Q: My question is, you have used the word "casual" in a unique manner, isn't that true?
>
> A. Yes.

Id. at 151-52. Moreover, Brand was aware that Central States was not told of this unusual meaning given to "casual employee."

> Q: You didn't tell Central States, did you, in the contract that you were using these words in a unique manner?
>
> . . . .
>
> A: I assumed when we sent you people the contract that they read it and that if they had any question about what this means, they would ask. And if they don't ask, they accept it.

Id. at 153.

Clearly, the union and the employers attached to "casual employees" a meaning different from its plain meaning and yet did not tell Central States of their intention. For purposes of ERISA, such conduct is no different from when parties orally agree to ignore the unambiguous terms of a written agreement. As indicated, section 515 was intended to preclude such a defense. Gerber, 870 F.2d at 1153. Whatever their intent, given an unambiguous agreement, the parties must follow its terms when dealing with the pension plan.

III. CONCLUSION

The employers in this case argue that the agreements at issue were ambiguous, but not because of any misunderstanding between the parties to the contract. Given the purpose of written contracts and section 515 of ERISA, the parties to a collective bargaining agreement are bound by the terms of their agreement, regardless of their undisclosed intent. By so holding, we merely reaffirm a basic rule of contract interpretation. "A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared." Robbins, 836 F.2d at 332. Section 515 of ERISA emphasizes that this is especially true as to third

parties obligated to administer a pension fund according to the terms of written agreements. The judgment of the district court is reversed and this matter is remanded for proceedings consistent with this opinion. Given our decision on the merits, the judgment of the district court denying the employers' request for attorneys' fees is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed April 28, 1989
Plaintiffs,	)	No. 84-1669 C (5)
vs.	)	
N.E. FRIEDMEYER-SELLMEYER DISTRIBUTING COMPANY,	)	
Defendant.	)	

MEMORANDUM

Plaintiffs Central States, Southeast and Southwest Areas Pension Fund and trustee Howard J. McDougall brought suit against N.E. Friedmeyer-Sellmeyer Distributing Company (Friedmeyer) and approximately 22 separate produce companies, all members of the St. Louis Fruit and Produce Association. Plaintiffs seek employer contributions on behalf of "casual employees," the definition of which is the essential issue in these

cases. This Memorandum constitutes the Court's findings of fact and conclusions of law for the purpose of Fed.R.Civ.P. 52(a).

I. Motions in Limine.

Prior to trial, both parties filed motions in limine, which the Court took with the case. The Court will address these motions prior to making its findings of fact and conclusions of law.

Defendant filed a motion to exclude the testimony of plaintiffs' expert witness, Professor Neil Bernstein. Defendant contends that Bernstein's application of labor law to the facts in this case is not proper testimony for an expert witness. Plaintiffs argue that the Court has the discretion to admit expert testimony bearing on the ultimate issues of the case.

Fed.R.Evid. 704 provides that an expert's testimony is not objectionable

merely because it embraces an ultimate issue to be decided by the trier of fact. This does not mean that all expert testimony is admissible. The Notes of the Advisory Committee to that rule explain that the opinion still must meet the standard set forth in Rule 702 that the testimony of the expert "assist the trier of fact to understand the evidence or to determine a fact in issue."

There is no dispute that Professor Bernstein's credentials are substantial. Nevertheless, the Court cannot permit expert testimony on the ultimate legal issues to be determined by the Court. To allow such testimony would set a dangerous precedent that does little more than delegate the Court's duties to legal scholars. The Court will sustain defendant's motion and will exclude the testimony of Professor Bernstein in makings its decision in this case.

Plaintiffs filed three motions in limine. Plaintiffs' first motion addresses two issues: first, any oral agreement or understanding between Local 688 and the Produce Row companies concerning the payment of pension fund contributions for casual employees; and second, any understanding, practice or custom of dealing concerning casual employees between the Produce Row companies and Local 688. This motion goes to the crux of the issue in this case -- whether the Court may consider Friedmeyer's past practices in determining whether it now must contribute to the Pension Fund for casual employees. Because this motion goes to the ultimate issue before the Court, it will be addressed in the Court's conclusions of law.

In plaintiffs' second motion in limine, it contends that reports of

investigations by or proceedings before the National Labor Relations Board (NLRB) should be excluded from evidence. Plaintiffs' motion concerns an investigation made by the NLRB after a grievance was filed by Lon Jamison, an employee of M. Rizzo and Company, another Produce Row Company. The grievance was filed against M. Rizzo and Local 688, charging them with unfair labor practices. Similar grievances were filed by Mark Kerperion and Darell Chamberlain against George A. Heimos Produce Company and Local 688.

At trial, defendant introduced and the Court received into evidence, subject to plaintiffs' objection, defendant's exhibit Q, which is a letter to Kerperion from the NLRB. After an investigation, the NLRB determined that it would not issue a complaint in Kerperion's case. Defendant did not introduce any evidence

relating to the complaint Jamison filed with the NLRB.

Plaintiffs' argument against admission of the NLRB report would require a finding by the Court that the report lacks trustworthiness, and therefore would be inadmissible heresay. **See** Fed.R.Evid. 803(8)(C). Despite plaintiffs' contention, there is nothing about the report that indicates that it is not trustworthy. The Court will deny plaintiff's motion in limine.

Plaintiffs' third motion in limine seeks to exclude Vincent T. Vogler as a witness, or in the alternative, to disqualify him as counsel for defendant. In defendant's pretrial compliance, Vogler was listed as a witness defendant "will call." Plaintiffs listed Vogler in their pretrial compliance as a witness they "may call." On May 9, 1988, the first day of trial, Vogler withdrew as

counsel for defendant, and later testified on behalf of defendant. In light of Vogler's withdrawal as counsel for defendant, the Court will deny plaintiffs' third motion in limine.

II. Findings of Fact.

At the time of trial the parties filed a joint stipulation of findings of fact, leaving few factual issues in dispute. The Central States Pension Fund is an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA) and the Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1002 **et seq**. Contributions to the Pension Fund are governed by certain Collective Bargaining Agreements (CBAs) entered into between the St. Louis Fruit and Produce Association (on behalf of defendant and other Produce Row companies) and Teamsters Local Union No. 688, affiliated with the

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Collective Bargaining Agreements were executed in 1973, 1976, 1979 and 1982, each covering a three-year period.[1] Each CBA defined "employee" as follows in Article I, Section I:

> The term "Employee" as used in this Agreement shall include all employees engaged in the handling of merchandise in the shipping, receiving, storing and warehousing thereof including maintenance department employees, INCLUDING, but not by way of limitation, SUPERINTENDENTS, OFFICE AND CLERICAL EMPLOYEES.

Beyond this definition, employees are divided into three groups: regular, probationary and casual employees. Only probationary and casual employees are

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1 Plaintiffs filed this action on July 18, 1984, during the time the 1982 CBA was in effect. The 1985 CBA, which was nearly identical to the 1982 CBA, was in effect at the time this case was tried in May 1988.

specifically defined in the CBAs. The 1973, 1976 and 1979 CBAs defined probationary and casual employees in Article IX as follows:

> Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.
>
> Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees (casuals)." Such casuals may be used as follows and subject to the conditions listed:
>
> 1. Casuals may be hired where the normal then existing number of

working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason....

> 7. Uniform absentee records to be kept daily with amount of casual hours used.
>
> 8. When opening [sic] for regular employee occur, casuals working at that Company at that time, will be considered first for said opening before hiring from the outside, if they qualify.

The definitions of probationary and casual employees were changed in the 1982 CBA. Article IX, Section 1 provided that new employees would be on probation for a period of 60 days, and Section 2 eliminated the provision that casual employees could work a cumulative maximum of 80 hours during any calendar month. Finally, under the 1982 CBA, a seniority list was established for casual employees and they were given four paid holidays each year. These same provisions were also contained in the 1985 CBA.

The Produce Row employers also executed documents called pension

agreements that outlined the rates of the employers' pension contributions. The agreements also provided that the employers and the union would be bound by all the rules and regulations of the Central States Trust Agreement. The trust agreement requires the employers to make contributions in accordance with the collective bargaining agreements. Thus, the different agreements have gone full circle, requiring the Court to determine whether defendant and the other Produce Row employers have made pension fund contributions as required by the CBAs.

Historically, employees in the produce business hired two groups of employees -- those who received fringe benefits and those who did not. In recent years, the terms "regular employees" and "casual employees" have become associated with those two groups. Casual employees traditionally were hired to supplement

the work force during the peak periods, especially during the summer and Thanksgiving and Christmas holidays. Casuals also were used to replace employees who were not working due to vacation or sickness.

In addition to compensating regular employees with fringe benefits, the practice among Produce Row employers has been to pay regulars at a higher hourly rate than casual employees. On the job, regular employees could be distinguished from casuals by the different time cards they used and the union pins they wore. Until 1982, casual employees were not members of the union, and paid no union dues. Since 1982, they have received limited union benefits, including several paid holidays each year and recognition of seniority.

As beneficiaries of pension fund contributions, plaintiffs regularly

conduct audits of participating employers to determine compliance with collective bargaining agreements. Lamperson Fruit and Produce Company was selected at random for an audit by plaintiffs in October 1983. The Lamperson audit covered the period from September 28, 1980 to September 24, 1983. After the audit, James Dodd, Lamperson's owner, was informed that Lamperson owed $73,034.00 plus interest for "non-reporting of eligible Plan Participants." In the February 3, 1984 letter, plaintiffs' auditor concluded that Lamperson should make pension contributions for all employees who perform the same duties:

> The Fund's interpretation is that employees working consistently and performing the same duties as regular employees should not be classified as casual, but should be considered regular and eligible for pension contributions after they have completed their probationary period.

After the Lamperson audit, it became apparent to plaintiffs that it was the practice on Produce Row to hire casual employees who, in some cases, performed the same work as regular employees. Plaintiffs sought to conduct similar audits of Friedmeyer and other Produce Row employers. The employers refused to comply with the requests, and plaintiffs commenced separate actions against each of the Produce Row employers. On January 12, 1987, the Court ordered defendant to submit to an audit of its personnel records by plaintiffs for the purpose of determining whether defendant had complied with the provisions of the collective bargaining and trust agreements between the two parties between December 28, 1980 and December 31, 1983. **See Central States, Southeast and Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distr. Co.**, 650 F.Supp. 978, 980 (E.D.Mo. 1987).

Following the audit, plaintiffs calculated the amount they believed Friedmeyer owed the pension fund for persons classified as casual employees, but who were performing the same work as regular employees. Plaintiffs' Exhibit 41 showed an adjustment of $39,073.00. This exhibit was corrected by Plaintiffs' Exhibit 62, which omitted two employees who were not covered by the CBA. Exhibit 62 shows a corrected balance due from Friedmeyer of $24,774.00. Plaintiffs now seek to collect those funds.

III. Conclusions of Law.

The Court has subject matter jurisdiction pursuant to § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a); § 502 of ERISA, 29 U.S.C. § 1132; and 28 U.S.C. § 1331.

Central States was not a party to the collective bargaining agreement between

the Produce Row employers and the union. Rather, the pension fund is a third-party beneficiary of the collective bargaining agreement, **Robbins v. Lynch**, 836 F.2d 330, 333 (7th Cir. 1988), and is entitled to maintain an action to collect unpaid pension contributions under ERISA § 502. To aid employers and fund trustees with the collection of delinquent contributions, Congress enacted § 515 of ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions on such agreement.

Fund trustees are given broad authority in actions to collect overdue contributions because the class of potential beneficiaries includes all

employees who were covered employees within the meaning of a collective bargaining agreement, not just those employees for whom pension contributions were made.

The interpretation of a collective bargaining agreement is a question of law to be resolved by the Court by applying federal law principles. **Walsh v. Schlecht**, 429 U.S. 401, 407 (1977); **Abbate v. Browning-Ferris Industries**, 767 F.2d 52, 55-56 (3d Cir.1985). These principles must be fashioned from the policy of our national labor laws. **Id.** at 56 (quoting **Textile Workers Union v. Lincoln Mills**, 353 U.S. 448, 458 (1957)).

Where there is an ambiguity in a collective bargaining agreement, normal common law rules of construction do not apply. In **Transportation Communication Employees Union v. Union Pacific R.R. Co.**, 385 U.S. 157 (1966), the Supreme

Court stated, "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Id. at 161. See also Pierce County Hotel Employees and Restaurant Employees Health Trust v. Elks Lodge No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987)(interpretation of ambiguous term "depends on the parties' intent at the time of the contract's execution, in light of earlier negotiations, later conduct, related agreements and industrywide custom"). The use of extrinsic evidence to interpret an ambiguity must not be confused with the oral modification of a collective bargaining agreement, which is not enforceable. See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No.

87-2480, slip op. at 2 n.1 (7th Cir. March 17, 1989); **Operating Engineers Pension Trust v. Beck Engineering**, 746 F.2d 557, 568-69 (9th Cir. 1984).

Plaintiffs contend defendant is liable for pension fund contributions under five consecutive collective bargaining agreements covering the period from 1973 to 1988. The use of the term "casual employee" in these agreements creates an ambiguity that requires the Court to apply the rules of construction outlined above. The long-standing practice on Produce Row has been to hire certain persons who do not work as regular employees. Generally, casual employees were hired as extras during the peak periods or to fill in for regular employees who were sick or on vacation. It is not disputed that on some occasions casuals would work as much as regulars, but this is to be expected in an industry

where the workload is irregular and unpredictable.

Each of the CBAs between the Produce Row employers and the union reflects the practice of hiring casual employees who, because of their temporary status, do not receive the same wages, benefits or job security as regular employees. Although the 1973, 1976 and 1979 CBAs limited casuals to working 80 hours per month, neither the employees, Produce Row employers or the union adhered to this limit during the period covered by the agreements. Rather, it appears that this provision was merely an aberration from the time-honored tradition and practice of using casuals heavily during the peak periods and slacking off when there was less work to be performed.

The employers and union "corrected" the 80-hour rule in the 1982 CBA, when the limitation was eliminated. There is

no explanation why it took so long to conform the CBA to the practice and intention of the employers and union. Regardless of the reason, the change reflects the clear intention of the parties to the bargaining agreement that casual employees not be limited to working 80 hours per month. This history is helpful in defining the term "casual employees" as used in the collective bargaining agreements.

Plaintiffs suggest that the Produce Row employers and the local union orally modified the CBAs to the detriment of Central States and future claimants. The Court does not believe the cases cited by plaintiffs support this contention. The typical case plaintiffs cite involved the collection of pension fund contributions for persons who were covered by a CBA, but on whose behalf no contributions had been made. For example, in **Central**

States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No. 87-2480, slip op. (7th Cir. March 17, 1989), Gerber agreed in the collective bargaining agreement to make pension contributions on behalf of all truck drivers. Gerber had agreed with the local union, however, that the CBA would not be enforced, and that Gerber would contribute only for three employees. The court held that § 515 of ERISA does not permit employers to agree with the union to ignore the CBA and contribute on behalf of certain employees only.

A similar result was reached in Robbins v. Lynch, 836 F.2d 330 (7th Cir. 1988). In that case, Lynch signed a collective bargaining agreement, but later did not make pension fund contributions for several employees. Lynch claimed he had signed the agreement

only because the union threatened to strike unless certain employees were included within the CBA, and that he had never intended to abide by the agreement. Addressing Lynch's "intent not to be bound," the court of appeals stated:

> A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared. You can't escape contractual obligation by signing with your fingers crossed behind your back, even if that clearly shows your intent not to be bound.

Robbins, 836 F.2d at 332.

Unlike **Gerber**, **Robbins** and other cases cited by plaintiffs, the CBAs signed by Friedmeyer and the other Produce Row employers clearly excluded casual employees from the benefits afforded regular employees. There were no secret agreements, false representations, oral modifications or

other plans not to abide by the collective bargaining agreements. Quite simply, the Produce Row employers acted exactly as they agreed -- they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees.

Plaintiffs' case rests on the assumption that the Produce Row employers do not follow the "normal" definition of "casual employees." Plaintiffs cite cases that purport to establish the "generally recognized guidelines and parameters as to which employees will qualify as 'casual.'" But even those cases point out that, depending on the circumstances, casual employees may work on a full-time basis for several weeks or months at a time.

Nor does the Court believe, as plaintiffs suggest, that the casual employees on Produce Row have been the

victims of split-unit bargaining, which is impermissible under ERISA. Split-unit bargaining occurs when two groups of employees performing similar work receive different benefits. This issue normally arises in cases before the NLRB, which will examine two or more different bargaining units in light of "whether employees share a similar community of interest." **The Developing Labor Law** 416 (C. Morris 2d ed. 1983). Among the factors to be considered in determining community of interest apart from other employees are a difference of method of wages or compensation, different hours of work, different employment benefits, separate supervision, the degree of dissimilar qualifications, training and skills, differences in job functions and the history of bargaining. **Id.** **See Kalamazoo Paper Box Corp.**, 49 LRRM 1715, 1717, 136 NLRB 134, 137 (1962). Among

Produce Row employees, there is some similarity between the work performed by regular and casual employees. However, the distinctions between regulars and casuals -- seniority, compensation and other benefits, longevity of employment, work history and the fact that most casuals are not "career" employees -- outweigh the similarity between the two groups of employees. The community of interest between the two groups does not rise to the level required to place regular and casual employees within the same bargaining unit.

The Court finds, therefore, that defendant has not violated federal labor laws or the provisions of the collective bargaining agreement by not making pension fund contributions on behalf of casual employees. The Court recognizes that its decision today ratifies the past practice on Produce Row of designating

some workers as regular employees and others as casual employees. This result is required by the unique nature of the work on Produce Row. For example, some employees may work full time for 60 to 90 days and then not work again for a substantial period of time. Others may work as little as once every three to four weeks.

A court-imposed definition of the term "casual employee" would defeat one of the purposes of collective bargaining, which is to allow employers and union representatives to meet in a collegial setting and agree to certain employment practices that benefit all participants. The future of casual employees rests with the pension fund, Produce Row employers and the union -- not with the Court. Only through compromise will the employees and the union reach an agreement in which casual employees are

sufficiently defined so that the agreement will receive the required approval of the pension fund.

One might argue that the Court's decision opens the door for the employers on Produce Row to hire only casual employees, thereby avoiding the payment of any pension benefits. The obvious downfall of this argument is that a class of employees, regardless of the name given the class, is always free to bargain for employer-contributed benefits. The compensation paid to any employee -- on Produce Row or elsewhere -- is always determined by the supply and demand of the workforce. Today's decision reaffirms this principle.

Dated this 28th day of April, 1989.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed April 28, 1989
Plaintiffs,	)	No. 84-1712 C (5)
vs.	)	
HEIMOS PRODUCE COMPANY,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund and trustee Howard J. McDougall, and in favor of defendant Heimos Produce Company on the merits of plaintiffs' complaint. This judgment, for its basis, adopts the memorandum entered this day in Central States, Southeast and Southwest Areas Pension

Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 28th day of April, 1989.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	FILED May 17, 1989 Eyvon Mendenhall U.S. District Court E. District of Mo.
Plaintiffs,	)	
v.	)	No. 84-1853C(3)
WALTER A. RUBIN, d/b/a M.J.M. PRODUCE EXCHANGE,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund, and trustee Howard McDougall, and in favor of defendant Walter A. Rubin, d/b/a M.J.M. Produce Exchange on the merits of plaintiffs' complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and

Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 17th day of May, 1991.

/s/ William Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed May 17, 1989
Plaintiffs,	)	No. 84-1832C(3)
vs.	)	
INDEPENDENT FRUIT AND PRODUCE COMPANY,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund, and trustee Howard McDougall, and in favor of defendant Independent Fruit and Produce Company on the merits of plaintiffs' complaint.

This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest

Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 17th day of May, 1989.

/s/ William Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,	)	Filed July 3, 1989
Plaintiffs,	)	No. 84-1857-C(1)
vs.	)	
JOHN MOON PRODUCE COMPANY, a corporation,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant John Moon Produce Company on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest Areas

Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,	)	Filed July 3, 1989
Plaintiffs,	)	No. 84-1869-C(1)
vs.	)	
STANLEY PRODUCE, INC., a corporation,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant Stanley Produce, Inc. on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest Areas

Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., Plaintiffs,	)	Filed July 3, 1989
vs.	)	No. 84-1834-C(1)
ROBERT JOHNSON, an Individual, d/b/a J. JOHNSON FRUIT & PRODUCE COMPANY, Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant, Robert Johnson d/b/a J. Johnson Fruit & Produce Company, on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central

States, Southeast and Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,	)	Filed July 3, 1989
Plaintiffs,	)	No. 84-1658C(1)
vs.	)	
ADOLPH A. SOLOMON and IRL S. SOLOMON, Statutory Trustees for ADOLPH & CERESIA PRODUCE COMPANY,	)	
Defendants.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendants, Adolph A. Solomon and Irl S. Solomon, Statutory Trustees for Adolph & Ceresia Produce Company, on the merits of Plaintiffs' Complaint. This judgment,

for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., Plaintiffs,	)	Filed July 3, 1989
vs.	)	No. 84-1871-C(1)
UNITED FRUIT & PRODUCE COMPANY, a corporation, Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant United Fruit & Produce Company on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest

Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., Plaintiffs,	)	Filed August 28, 1989
vs.	)	No. 84-1689-C(4)
GOLDMAN FRUIT & PRODUCE COMPANY, a corporation, Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant Goldman Fruit & Produce Company on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest

Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 28th day of August, 1989.

/s/ Clyde S. Cahill
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and HOWARD McDOUGALL, a Trustee of the Central States Southeast and Southwest Areas Pension Fund,	)	Filed January 3, 1990
Plaintiffs,	)	No. 84-1657-C (4)
vs.	)	
FRANKLIN PRODUCE COMPANY, a Missouri corporation,	)	
Defendant.	)	

ORDER

IT IS HEREBY ORDERED that judgment be and is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund, a pension trust, and Howard J. McDougall, its Trustee, and in favor of defendant

Franklin Produce Company, a Missouri corporation, on the merits of plaintiffs' complaint. This judgment, for its basis and rationale, adopts the memorandum entered on April 28, 1989, by Judge Stephen N. Limbaugh in Central States, Southeast and Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C (5) (copy attached).

SO ORDERED.

Dated this 3rd day of January, 1990.

/s/ Clyde S. Cahill
Clyde S. Cahill
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed April 28, 1989
Plaintiffs,	)	No. 84-1669 C (5)
vs.	)	
N.E. FRIEDMEYER-SELLMEYER DISTRIBUTING COMPANY,	)	
Defendant.	)	

MEMORANDUM

Plaintiffs Central States, Southeast and Southwest Areas Pension Fund and trustee Howard J. McDougall brought suit against N.E. Friedmeyer-Sellmeyer Distributing Company (Friedmeyer) and approximately 22 separate produce companies, all members of the St. Louis Fruit and Produce Association. Plaintiffs seek employer contributions on behalf of "casual employees," the definition of which is the essential issue in these

cases. This Memorandum constitutes the Court's findings of fact and conclusions of law for the purpose of Fed.R.Civ.P. 52(a).

I. Motions in Limine.

Prior to trial, both parties filed motions in limine, which the Court took with the case. The Court will address these motions prior to making its findings of fact and conclusions of law.

Defendant filed a motion to exclude the testimony of plaintiffs' expert witness, Professor Neil Bernstein. Defendant contends that Bernstein's application of labor law to the facts in this case is not proper testimony for an expert witness. Plaintiffs argue that the Court has the discretion to admit expert testimony bearing on the ultimate issues of the case.

Fed.R.Evid. 704 provides that an expert's testimony is not objectionable

merely because it embraces an ultimate issue to be decided by the trier of fact. This does not mean that all expert testimony is admissible. The Notes of the Advisory Committee to that rule explain that the opinion still must meet the standard set forth in Rule 702 that the testimony of the expert "assist the trier of fact to understand the evidence or to determine a fact in issue."

There is no dispute that Professor Bernstein's credentials are substantial. Nevertheless, the Court cannot permit expert testimony on the ultimate legal issues to be determined by the Court. To allow such testimony would set a dangerous precedent that does little more than delegate the Court's duties to legal scholars. The Court will sustain defendant's motion and will exclude the testimony of Professor Bernstein in makings its decision in this case.

Plaintiffs filed three motions in limine. Plaintiffs' first motion addresses two issues: first, any oral agreement or understanding between Local 688 and the Produce Row companies concerning the payment of pension fund contributions for casual employees; and second, any understanding, practice or custom of dealing concerning casual employees between the Produce Row companies and Local 688. This motion goes to the crux of the issue in this case -- whether the Court may consider Friedmeyer's past practices in determining whether it now must contribute to the Pension Fund for casual employees. Because this motion goes to the ultimate issue before the Court, it will be addressed in the Court's conclusions of law.

In plaintiffs' second motion in limine, it contends that reports of

investigations by or proceedings before the National Labor Relations Board (NLRB) should be excluded from evidence. Plaintiffs' motion concerns an investigation made by the NLRB after a grievance was filed by Lon Jamison, an employee of M. Rizzo and Company, another Produce Row Company. The grievance was filed against M. Rizzo and Local 688, charging them with unfair labor practices. Similar grievances were filed by Mark Kerperion and Darell Chamberlain against George A. Heimos Produce Company and Local 688.

At trial, defendant introduced and the Court received into evidence, subject to plaintiffs' objection, defendant's exhibit Q, which is a letter to Kerperion from the NLRB. After an investigation, the NLRB determined that it would not issue a complaint in Kerperion's case. Defendant did not introduce any evidence

relating to the complaint Jamison filed with the NLRB.

Plaintiffs' argument against admission of the NLRB report would require a finding by the Court that the report lacks trustworthiness, and therefore would be inadmissible heresay. **See** Fed.R.Evid. 803(8)(C). Despite plaintiffs' contention, there is nothing about the report that indicates that it is not trustworthy. The Court will deny plaintiff's motion in limine.

Plaintiffs' third motion in limine seeks to exclude Vincent T. Vogler as a witness, or in the alternative, to disqualify him as counsel for defendant. In defendant's pretrial compliance, Vogler was listed as a witness defendant "will call." Plaintiffs listed Vogler in their pretrial compliance as a witness they "may call." On May 9, 1988, the first day of trial, Vogler withdrew as

counsel for defendant, and later testified on behalf of defendant. In light of Vogler's withdrawal as counsel for defendant, the Court will deny plaintiffs' third motion in limine.

II. Findings of Fact.

At the time of trial the parties filed a joint stipulation of findings of fact, leaving few factual issues in dispute. The Central States Pension Fund is an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA) and the Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1002 **et seq**. Contributions to the Pension Fund are governed by certain Collective Bargaining Agreements (CBAs) entered into between the St. Louis Fruit and Produce Association (on behalf of defendant and other Produce Row companies) and Teamsters Local Union No. 688, affiliated with the

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Collective Bargaining Agreements were executed in 1973, 1976, 1979 and 1982, each covering a three-year period.[1] Each CBA defined "employee" as follows in Article I, Section I:

> The term "Employee" as used in this Agreement shall include all employees engaged in the handling of merchandise in the shipping, receiving, storing and warehousing thereof including maintenance department employees, INCLUDING, but not by way of limitation, SUPERINTENDENTS, OFFICE AND CLERICAL EMPLOYEES.

Beyond this definition, employees are divided into three groups: regular, probationary and casual employees. Only probationary and casual employees are

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1 Plaintiffs filed this action on July 18, 1984, during the time the 1982 CBA was in effect. The 1985 CBA, which was nearly identical to the 1982 CBA, was in effect at the time this case was tried in May 1988.

specifically defined in the CBAs. The 1973, 1976 and 1979 CBAs defined probationary and casual employees in Article IX as follows:

> Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.
>
> Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees (casuals)." Such casuals may be used as follows and subject to the conditions listed:
>
> 1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason....

> 7. Uniform absentee records to be kept daily with amount of casual hours used.
>
> 8. When opening [sic] for regular employee occur, casuals working at that Company at that time, will be considered first for said opening before hiring from the outside, if they qualify.

The definitions of probationary and casual employees were changed in the 1982 CBA. Article IX, Section 1 provided that new employees would be on probation for a period of 60 days, and Section 2 eliminated the provision that casual employees could work a cumulative maximum of 80 hours during any calendar month. Finally, under the 1982 CBA, a seniority list was established for casual employees and they were given four paid holidays each year. These same provisions were also contained in the 1985 CBA.

The Produce Row employers also executed documents called pension

agreements that outlined the rates of the employers' pension contributions. The agreements also provided that the employers and the union would be bound by all the rules and regulations of the Central States Trust Agreement. The trust agreement requires the employers to make contributions in accordance with the collective bargaining agreements. Thus, the different agreements have gone full circle, requiring the Court to determine whether defendant and the other Produce Row employers have made pension fund contributions as required by the CBAs.

Historically, employees in the produce business hired two groups of employees -- those who received fringe benefits and those who did not. In recent years, the terms "regular employees" and "casual employees" have become associated with those two groups. Casual employees traditionally were hired to supplement

the work force during the peak periods, especially during the summer and Thanksgiving and Christmas holidays. Casuals also were used to replace employees who were not working due to vacation or sickness.

In addition to compensating regular employees with fringe benefits, the practice among Produce Row employers has been to pay regulars at a higher hourly rate than casual employees. On the job, regular employees could be distinguished from casuals by the different time cards they used and the union pins they wore. Until 1982, casual employees were not members of the union, and paid no union dues. Since 1982, they have received limited union benefits, including several paid holidays each year and recognition of seniority.

As beneficiaries of pension fund contributions, plaintiffs regularly

conduct audits of participating employers to determine compliance with collective bargaining agreements. Lamperson Fruit and Produce Company was selected at random for an audit by plaintiffs in October 1983. The Lamperson audit covered the period from September 28, 1980 to September 24, 1983. After the audit, James Dodd, Lamperson's owner, was informed that Lamperson owed $73,034.00 plus interest for "non-reporting of eligible Plan Participants." In the February 3, 1984 letter, plaintiffs' auditor concluded that Lamperson should make pension contributions for all employees who perform the same duties:

> The Fund's interpretation is that employees working consistently and performing the same duties as regular employees should not be classified as casual, but should be considered regular and eligible for pension contributions after they have completed their probationary period.

After the Lamperson audit, it became apparent to plaintiffs that it was the practice on Produce Row to hire casual employees who, in some cases, performed the same work as regular employees. Plaintiffs sought to conduct similar audits of Friedmeyer and other Produce Row employers. The employers refused to comply with the requests, and plaintiffs commenced separate actions against each of the Produce Row employers. On January 12, 1987, the Court ordered defendant to submit to an audit of its personnel records by plaintiffs for the purpose of determining whether defendant had complied with the provisions of the collective bargaining and trust agreements between the two parties between December 28, 1980 and December 31, 1983. **See Central States, Southeast and Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distr. Co.**, 650 F.Supp. 978, 980 (E.D.Mo. 1987).

Following the audit, plaintiffs calculated the amount they believed Friedmeyer owed the pension fund for persons classified as casual employees, but who were performing the same work as regular employees. Plaintiffs' Exhibit 41 showed an adjustment of $39,073.00. This exhibit was corrected by Plaintiffs' Exhibit 62, which omitted two employees who were not covered by the CBA. Exhibit 62 shows a corrected balance due from Friedmeyer of $24,774.00. Plaintiffs now seek to collect those funds.

III. Conclusions of Law.

The Court has subject matter jurisdiction pursuant to § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a); § 502 of ERISA, 29 U.S.C. § 1132; and 28 U.S.C. § 1331.

Central States was not a party to the collective bargaining agreement between

the Produce Row employers and the union. Rather, the pension fund is a third-party beneficiary of the collective bargaining agreement, **Robbins v. Lynch**, 836 F.2d 330, 333 (7th Cir. 1988), and is entitled to maintain an action to collect unpaid pension contributions under ERISA § 502. To aid employers and fund trustees with the collection of delinquent contributions, Congress enacted § 515 of ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions on such agreement.

Fund trustees are given broad authority in actions to collect overdue contributions because the class of potential beneficiaries includes all

employees who were covered employees within the meaning of a collective bargaining agreement, not just those employees for whom pension contributions were made.

The interpretation of a collective bargaining agreement is a question of law to be resolved by the Court by applying federal law principles. **Walsh v. Schlecht**, 429 U.S. 401, 407 (1977); **Abbate v. Browning-Ferris Industries**, 767 F.2d 52, 55-56 (3d Cir.1985). These principles must be fashioned from the policy of our national labor laws. **Id.** at 56 (quoting **Textile Workers Union v. Lincoln Mills**, 353 U.S. 448, 458 (1957)).

Where there is an ambiguity in a collective bargaining agreement, normal common law rules of construction do not apply. In **Transportation Communication Employees Union v. Union Pacific R.R. Co.**, 385 U.S. 157 (1966), the Supreme

Court stated, "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Id. at 161. See also Pierce County Hotel Employees and Restaurant Employees Health Trust v. Elks Lodge No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987)(interpretation of ambiguous term "depends on the parties' intent at the time of the contract s execution, in light of earlier negotiations, later conduct, related agreements and industrywide custom"). The use of extrinsic evidence to interpret an ambiguity must not be confused with the oral modification of a collective bargaining agreement, which is not enforceable. See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No.

87-2480, slip op. at 2 n.1 (7th Cir. March 17, 1989); **Operating Engineers Pension Trust v. Beck Engineering**, 746 F.2d 557, 568-69 (9th Cir. 1984).

Plaintiffs contend defendant is liable for pension fund contributions under five consecutive collective bargaining agreements covering the period from 1973 to 1988. The use of the term "casual employee" in these agreements creates an ambiguity that requires the Court to apply the rules of construction outlined above. The long-standing practice on Produce Row has been to hire certain persons who do not work as regular employees. Generally, casual employees were hired as extras during the peak periods or to fill in for regular employees who were sick or on vacation. It is not disputed that on some occasions casuals would work as much as regulars, but this is to be expected in an industry

where the workload is irregular and unpredictable.

Each of the CBAs between the Produce Row employers and the union reflects the practice of hiring casual employees who, because of their temporary status, do not receive the same wages, benefits or job security as regular employees. Although the 1973, 1976 and 1979 CBAs limited casuals to working 80 hours per month, neither the employees, Produce Row employers or the union adhered to this limit during the period covered by the agreements. Rather, it appears that this provision was merely an aberration from the time-honored tradition and practice of using casuals heavily during the peak periods and slacking off when there was less work to be performed.

The employers and union "corrected" the 80-hour rule in the 1982 CBA, when the limitation was eliminated. There is

no explanation why it took so long to conform the CBA to the practice and intention of the employers and union. Regardless of the reason, the change reflects the clear intention of the parties to the bargaining agreement that casual employees not be limited to working 80 hours per month. This history is helpful in defining the term "casual employees" as used in the collective bargaining agreements.

Plaintiffs suggest that the Produce Row employers and the local union orally modified the CBAs to the detriment of Central States and future claimants. The Court does not believe the cases cited by plaintiffs support this contention. The typical case plaintiffs cite involved the collection of pension fund contributions for persons who were covered by a CBA, but on whose behalf no contributions had been made. For example, in **Central**

States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No. 87-2480, slip op. (7th Cir. March 17, 1989), Gerber agreed in the collective bargaining agreement to make pension contributions on behalf of all truck drivers. Gerber had agreed with the local union, however, that the CBA would not be enforced, and that Gerber would contribute only for three employees. The court held that § 515 of ERISA does not permit employers to agree with the union to ignore the CBA and contribute on behalf of certain employees only.

A similar result was reached in **Robbins v. Lynch**, 836 F.2d 330 (7th Cir. 1988). In that case, Lynch signed a collective bargaining agreement, but later did not make pension fund contributions for several employees. Lynch claimed he had signed the agreement

only because the union threatened to strike unless certain employees were included within the CBA, and that he had never intended to abide by the agreement. Addressing Lynch's "intent not to be bound," the court of appeals stated:

> A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared. You can't escape contractual obligation by signing with your fingers crossed behind your back, even if that clearly shows your intent not to be bound.

Robbins, 836 F.2d at 332.

Unlike **Gerber**, **Robbins** and other cases cited by plaintiffs, the CBAs signed by Friedmeyer and the other Produce Row employers clearly excluded casual employees from the benefits afforded regular employees. There were no secret agreements, false representations, oral modifications or

other plans not to abide by the collective bargaining agreements. Quite simply, the Produce Row employers acted exactly as they agreed -- they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees.

Plaintiffs' case rests on the assumption that the Produce Row employers do not follow the "normal" definition of "casual employees." Plaintiffs cite cases that purport to establish the "generally recognized guidelines and parameters as to which employees will qualify as 'casual.'" But even those cases point out that, depending on the circumstances, casual employees may work on a full-time basis for several weeks or months at a time.

Nor does the Court believe, as plaintiffs suggest, that the casual employees on Produce Row have been the

victims of split-unit bargaining, which is impermissible under ERISA. Split-unit bargaining occurs when two groups of employees performing similar work receive different benefits. This issue normally arises in cases before the NLRB, which will examine two or more different bargaining units in light of "whether employees share a similar community of interest." **The Developing Labor Law** 416 (C. Morris 2d ed. 1983). Among the factors to be considered in determining community of interest apart from other employees are a difference of method of wages or compensation, different hours of work, different employment benefits, separate supervision, the degree of dissimilar qualifications, training and skills, differences in job functions and the history of bargaining. **Id.** **See Kalamazoo Paper Box Corp.**, 49 LRRM 1715, 1717, 136 NLRB 134, 137 (1962). Among

Produce Row employees, there is some similarity between the work performed by regular and casual employees. However, the distinctions between regulars and casuals -- seniority, compensation and other benefits, longevity of employment, work history and the fact that most casuals are not "career" employees -- outweigh the similarity between the two groups of employees. The community of interest between the two groups does not rise to the level required to place regular and casual employees within the same bargaining unit.

The Court finds, therefore, that defendant has not violated federal labor laws or the provisions of the collective bargaining agreement by not making pension fund contributions on behalf of casual employees. The Court recognizes that its decision today ratifies the past practice on Produce Row of designating

some workers as regular employees and others as casual employees. This result is required by the unique nature of the work on Produce Row. For example, some employees may work full time for 60 to 90 days and then not work again for a substantial period of time. Others may work as little as once every three to four weeks.

A court-imposed definition of the term "casual employee" would defeat one of the purposes of collective bargaining, which is to allow employers and union representatives to meet in a collegial setting and agree to certain employment practices that benefit all participants. The future of casual employees rests with the pension fund, Produce Row employers and the union -- not with the Court. Only through compromise will the employees and the union reach an agreement in which casual employees are

sufficiently defined so that the agreement will receive the required approval of the pension fund.

One might argue that the Court's decision opens the door for the employers on Produce Row to hire only casual employees, thereby avoiding the payment of any pension benefits. The obvious downfall of this argument is that a class of employees, regardless of the name given the class, is always free to bargain for employer-contributed benefits. The compensation paid to any employee -- on Produce Row or elsewhere -- is always determined by the supply and demand of the workforce. Today's decision reaffirms this principle.

Dated this 28th day of April, 1989.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1927

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

INDEPENDENT FRUIT AND PRODUCE CO., a Missouri corporation,
Appellee.

No. 89-1928

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

WALTER A. RUBIN, d/b/a M.J.M. PRODUCE EXCHANGE,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

No. 89-1929

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SUGAR RIPE BANANA COMPANY,
Appellee.

No. 89-1933

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

N.E. FRIEDMEYER-SELLMEYER, DISTRIBUTING COMPANY,
Appellee.

No. 89-1934

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SALVATORE PUPILLO, d/b/a PUPILLO FRUIT COMPANY,
Appellee.

No. 89-1935

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GEORGE A. HEIMOS PRODUCE COMPANY, INC.,
Appellee.

No. 89-1936

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

WILLIAM MANTIA FRUIT COMPANY, INC.,
Appellee.

No. 89-1937

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ST. LOUIS BANANA AND TOMATO COMPANY, INC.,
Appellee.

No. 89-2204

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

LAMPERSON FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2205

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

LOMBARDO FRUIT AND PRODUCE COMPANY,
Appellee.

No. 89-2206

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

JOHN MOON PRODUCE COMPANY, Appellee.

No. 89-2207

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

STANLEY PRODUCE, INC., Appellee.

No. 89-2208

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ROBERT JOHNSON, d/b/a J. JOHNSON, FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2209

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ADOLPH A. SOLOMON AND IRL S. SOLOMON, STATUTORY TRUSTEES FOR ADOLPH & CERESIA PRODUCE CO.,
Appellees.

No. 89-2210

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

UNITED FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2438

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GOLDMAN FRUIT & PRODUCE CO., INC.,
Appellee.

No. 90-1160

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

JULES J. SCHWARTZ AND JOSEPH F. SCHWARTZ, d/b/a NEW MARKET PRODUCE COMPANY,
Appellees.

No. 90-1161

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

FRANKLIN PRODUCE COMPANY, a Missouri Corporation,
Appellee.

No. 90-1162

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

MARSKE PRODUCE COMPANY, INC.,
Appellee.

No. 89-2839

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellee,

v.

GEORGE A. HEIMOS PRODUCE CO., INC.,
Appellant.

No. 89-2840

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellee,	*
v.	*
N.E. FRIEDEMEYER-SELLMEYER DISTRIBUTING COMPANY, Appellant.	*

Appellees' petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

February 11, 1991

Order Entered at the Direction of the Court:
/s/
Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

29 U.S.C. §186. Restrictions on financial transactions.

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and

exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain

provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs; *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing

of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and

possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

29 U.S.C. §1145 Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

_I_N_D_E_X_

RECEIVED

CONT.

PRODUCE ROW

Oct. 2, 1973

JUNE 1st, 1973

RECEIVED

TO

MAIL

MAY 31st, 1976

(Illegible)

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.

Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees' (casuals)". Such casuals may be used as follows and subject to the conditions listed:

1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they

work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason, including but not limited to, vacations, and illness; provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists. Casuals will not be used to fill vacation vacancies or other known vacancies of one calendar week or more on the day shift. The use of casuals to fill vacations shall be governed by the followings:

7. Uniform absentee records to be kept daily with amount of casual hours used.

8. When opening for regular employee occur, casuals working at that Company at that time, will be considered first for

said opening before hiring from the outside, if they qualify.

As of DECEMBER 31st of each year beginning with DECEMBER 31, 1969, the Employer's schedule shall be checked to ascertain the number of weeks in which vacations are scheduled. If on such schedule, vacations are scheduled for each of the fifty-two (52) weeks of the subsequent calendar year, the following formula shall be applied.

(a) Take the maximum number of employees scheduled for vacations which is common to each of the 52 weeks.

(b) Subtract this number from the number of employees scheduled for vacations in each particular week.

(c) The result obtained under paragraph (b) will determine the number of casuals who may be used for vacation replacements in each particular week.

EXAMPLE: For instance, if there are four (4) employees scheduled for vacation in each of twenty (20) weeks; three (3) employees scheduled for vacations in each of twenty-eight weeks; two (2) employees scheduled for vacations in each of four (4) weeks, the figure to be used for paragraph (a) above will be "TWO" ("2").

Using the instructions of paragraph (B) above, subtract two (2) from the number scheduled for vacations in each particular week. For those weeks with four (4) scheduled for vacations, subtract two (2) from four (4) leaving the Employer with the right to use two (2) casuals if replacements are needed, to fill two (2) vacation vacancies. For those weeks with three (3) employees scheduled for vacations subtract two (2) from three (3) leaving the Employer with the right to use one (1) casual if replacement is needed to fill such vacation vacancy. For those weeks with two (2) employees scheduled for vacations, the Employer would have no right to use casuals to fill vacation vacancies.

Vacation vacancies not filled by regular employees may be filled by casuals. When casuals are not available

to fill a daily vacancy on a particular shift, they may be used on any shift when available thereafter.

I N D E X

PRODUCE ROW

JUNE 1st, 1976

TO

MAY 31st, 1979

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A now employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.

Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees' (casuals)". Such casuals may be used as follows and subject to the conditions listed:

1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they

work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason, including but not limited to, vacations, and illness; provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists. Casuals will not be used to fill vacation vacancies or other known vacancies of one calendar week or more on the day shift. The use of casuals to fill vacations shall be governed by the following:

7. Uniform absentee records to be kept daily with amount of casual hours used.

8. When opening for regular employee occur, casuals working at that Company at that time, will be considered first for

said opening before hiring from the outside, if they qualify.

I N D E X

PRODUCE ROW

JUNE 1, 1979

TO

MAY 31, 1982

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.

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2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they

work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare, Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason, including but not limited to, vacations, and illness; provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists. Casuals will not be used to fill vacation vacancies or other known vacancies of one calendar week or more on the day shift. The use of casuals to fill vacations shall be governed by the following:

7. Uniform absentee records to be kept daily with amount of casual hours used.

8. When opening for regular employee occur, casuals working at that Company at that time, will be considered first for

said opening before hiring from the outside, if they qualify.

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a sixty (60) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After sixty (60) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire. Employees that are hired as probationary employees from the casual list shall not be required to complete a sixty (60) day trial period.

Section 2. Casual Employees - The Employer may hire, subject to need, persons who will be known as "casual employees' (casuals)".

Section 3. When openings for regular employees occur, casuals working at that Company, at that time, will be considered first for said opening before hiring from the outside, if they qualify.

Section 4. Casuals shall be entitled to no guaranteed minimum number of hours.

Section 5. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare and Pension); and no seniority shall be acquired by such casuals. Casual employees shall receive four (4) paid holidays: New Year's Day, Christmas Day, Fourth of July and Labor Day.

Section 6. The Company shall establish a seniority list for casual employees. Casual employee's seniority shall be established as of January 31, 1982 or the date of hire, whichever is later.

CSU Cleveland State University Industrial Relations Center

James J. Nance
College of Business Administration
University Center, Room 460
2121 Euclid Avenue
Cleveland, Ohio 44115

Telephone: (216) 687-4750

March 20, 1991

Helen Gibson
Greensfelder, Hemker & Gale
10 South Broadway
Suite 1800
St. Louis, MO 63102

Dear Helen,

My apologies for the delay in sending your materials! I have been at a training seminar for the past week and my office did not feel comfortable sending the materials out without my approval. I certainly hope that the delay has not caused any inconvenience.

Enclosed you will find the summary sheet detailing our findings along with the blind sample language showing the sample that we found. As a caution, I wish to remind you that when we searched we were locating any use and/or definition of the word "casuals" or the phrase "casual employee". We did not interpret in any way the language we uncovered. I say this only to insure that you understand that while we found

Section 5. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare and Pension); and no seniority shall be acquired by such casuals. Casual employees shall receive four (4) paid holidays: New Year's Day, Christmas Day, Fourth of July and Labor Day.

Section 6. The Company shall establish a seniority list for casual employees. Casual employee's seniority shall be established as of January 31, 1982 or the date of hire, whichever is later.

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March 20, 1991

Helen Gibson
Greensfelder, Hemker & Gale
10 South Broadway
Suite 1800
St. Louis, MO 63102

Dear Helen,

My apologies for the delay in sending your materials! I have been at a training seminar for the past week and my office did not feel comfortable sending the materials out without my approval. I certainly hope that the delay has not caused any inconvenience.

Enclosed you will find the summary sheet detailing our findings along with the blind sample language showing the sample that we found. As a caution, I wish to remind you that when we searched we were locating any use and/or definition of the word "casuals" or the phrase "casual employee". We did not interpret in any way the language we uncovered. I say this only to insure that you understand that while we found

a number of references to the term that they may or may not support your stance.

If we can be of further service please do not hesitate to call.

Sincerely,

/s/ Sharon A. Brown
Sharon A. Brown
Administrator
Contract Library and Information Service
B:cj

Summary

Total number of collective bargaining agreements reviewed: 500

Total of the sample containing either the phrase "Casual Employee" or the term "Casual": 26

17 of the 26 contained definitions
9 of the 26 contained passing reference to the term

Distribution by Industry		# of Workers Covered
Manufacturing	1	5,000
Hospital	8	12,900
Service/Hotel	8	26,700
Utility	3	5,252
Cartage/Truck	6	285,000

Distribution by State

Multi-state	5
California	6
Florida	4
Minnesota	3
Hawaii	2
Washington	2
Ohio	1
Illinois	1
Iowa	1
Connecticut	1

"(material excised from the original)"

The following are terms and definitions that are used throughout this contract.

Full-time: The term "full-time" applies to a nurse working or employed by the Hospital to work eighty (80) hours in a two-week period or forty (40) hours per week.

Less than Full-Time:

Part-time: The term "part-time" applies to any nurse employed by the Hospital to work on a regularly scheduled continuing basis, for a usual specified number of hours from 32-79 hours per pay period.

Casual: The term "casual" applies to any nurse employed by the Hospital to work on a regularly scheduled continuing basis, for a usual specified number of hours from 1-31 hours per pay period.

Less than Minimal: The term "less than minimal" applies to any nurse employed by the Hospital to supplement the staffing needs. This nurse is not regularly scheduled any hours.

"(material excised from the original)"

2. A Casual Nurse is one who is employed to work on an intermittent basis.

3. A Temporary Nurse is one who is hired as an interim replacement, or one who is hired for temporary work on a predetermined work schedule which does not extend beyond three (3) calendar months.

"(material excised from the original)"

B. Casual Employees

(1) A casual employee is an individual who is not on the regular seniority list and who is not serving a probationary period. A casual may be either a replacement casual or a supplemental casual as hereinafter provided. Casuals shall not have seniority status. Casuals shall not be discriminated against for future employment.

(2) Replacement casuals may be utilized by an Employer to replace regular employees when such regular employees are off due to illness, vacations or other absence.

(3) Supplemental casuals may be used to supplement the regular work force as provided for in each respective Supplement. Once the number of new employees to be added as required in the Supplement is determined, the Employer must initiate the processing of the new probationary employees immediately, and

complete such processing as provided for in the Supplements.

(4) A monthly list of all extra (e.g. laid-off), casual (supplemental or replacement) and/or probationary employees used during that month shall be submitted to the Local Unions by the tenth (10th) day of the following month. Such list shall show:

(a) The employee's name, address, and Social Security number;

(b) The dates worked;

(c) The classification of work performed each day, and the hours worked;

(d) The name, if applicable, of the employee replaced.

This list shall be compiled on a daily basis, and shall be available for inspection by a union representative and/or shop steward.

"(material excised from the original)"

(b) **Probationary employee**. All new regular full-time employees shall be considered probationary employees for a period of ninety (90) calendar days. The Company reserves the right to terminate their employment for any reason until they have completed such probationary period. However, probationary employees shall be entitled to utilize the Grievance Procedure to grieve any matter which could be grieved by any other employee except termination within the probationary period of ninety (90) days.

(c) **Casual-regular employee**. Casual-regular employees are regularly scheduled at least one (1) day per week but less than four (4) days per week.

(d) **Casual-temporary employee**. Casual-temporary employees are scheduled to accommodate a specific period of expanded activity: i.e., summer season and holidays.
(NOTE: Casual-regular and casual-temporary employees are not covered by this Agreement.)

SECTION 6. UTILIZATION OF CASUAL EMPLOYEES.

(a) **Summer season**. Casual-regular and casual-temporary employees may be used for an expanded schedule of four (4) or more days per week and twenty (20) hours or more per week during the summer season which is deemed to begin with the week which contains March 1st, and to end with the week which contains August 31st. For this purpose, a week is deemed to begin with the first shift on Sunday and to end with the third shift on Saturday.

(b) **Other expanded activity**. A casual-regular and casual-temporary employee may be used for expanded schedules such as holiday periods for four (4) or more days per week and twenty (20) or more hours per week not to exceed thirty (30) calendar days for each period.

"(material excised from the original)"

Section 5 - Notification

(a) **Casual Employees**: For casual employees who work on a day-to-day basis, the Local Hiring Hall shall immediately supply such help to the Employer upon notice by the Employer that such casual employees are needed. In the event such casual help is not immediately available or the Local

Hiring Hall is closed, the Employer may then hire such casual workers from any other available source.

The Employer shall hire all casual or extra help in accordance with the terms of the hiring procedure outlined in the Local Union territorial jurisdiction where the work is performed. However, where there is heavy demand for casual or extra helpers in areas where loading and unloading is done, such casual or extra helpers may be permanently assigned to such areas.

(b) **Regular Employees**. If the Local Hiring Hall is unable to furnish qualified regular employees within forty-eight (48) hours after the Employer calls for them, the Employer shall be able to procure such employees from any other source. In such event, the Employer shall, within twenty-four (24) hours of the time of hiring, notify in writing the Local Union maintaining the hiring hall in that area of the name, address, social security number, and place of last employment of any employee so hired.

"(material excised from the original)"

2.4 CLASSES OF EMPLOYEES.

A. Regular Employee Defined. Regular employees are those who work a predetermined work schedule of between twenty (20) and forty (40) hours per week.

1. Regular Full-Time Employees. A regular full-time employee is one who works a predetermined work schedule amounting to forty (40) hours per week.

2. Regular Part-Time Employees. A regular part-time employee is one who works a predetermined work schedule amounting to twenty (20) hours or more per week but less than forty (40) hours per week.

B. Part-Time Employees. A part-time employees is one who works a predetermined work schedule amounting to fewer than twenty (20) hours per week.

C. Call-in or Casual Employees. A call-in or casual employee is one who works on an intermittent basis as the business warrants.

"(material excised from the original)"

Section 4 - Casual Employees

Casual employees are defined under this Agreement, consistent with applicable law under the National Labor Relations Act, as persons who are employed by the Employer on an intermittent or sporadic basis. In applying this definition to persons employed on a per diem basis in classifications otherwise covered by this Agreement, the Employer and the Union shall regard as casual employees per diem employees who work less than sixteen (16) hours over two (2)

successive payroll periods ending in the same calendar month.

"(material excised from the original)"

Section 2

(A) A regular employee is one who is employed by the Company on a job within the classifications covered by this agreement for the purpose of performing such work as has to be done continuously and regularly.

(B) All employees hired on a regular basis are to serve a probationary period of six (6) months from the original date of regular employment and are to be considered as on trial during such period. During this trial period, such employees should show an aptitude for the work in which they are engaged and the ability and desire to advance to the skilled classifications. In the event an employee makes a voluntary transfer or is promoted, the probationary period will be extended an additional six (6) months when notified by the Company, in writing, delivered to the Union at least fifteen (15) days prior to the expiration of the six (6) month period. During this trial period, the Company may, at its option, transfer, lay-off, or dismiss such employees; however, in all other matters these employees shall be entitled to benefits provided by this agreement.

(C) (1) A temporary employee is one who is employed by the Company on a job within the classifications covered by this agreement for a limited time on

a purely temporary basis for a period not to exceed six (6) months. If temporary employment, other than employment on a contingent basis, continues for more than six (6) months, the job shall be considered as a regular job and posted accordingly.

(2) A temporary or casual employee will receive wages, overtime pay and meals as provided for in this agreement and will be entitled to holidays with pay provided he works the work-day before and the work-day following the holiday.

(3) In the event new construction is contracted out, such work shall be performed under the applicable building trades wages and conditions.

(D) A reasonable number of student engineers may be assigned work in any department in classifications covered by the bargaining unit as a part of their training and, while so employed, shall neither be affected by provisions of this agreement, nor shall their employment affect the status of employees covered by this agreement. No student engineer shall work at any one job or classification for a period in excess of six (6) months.

(E) Temporary student employees will be held to a minimum and shall not affect the hiring of regular employees. These employees will be paid according to the jobs to which they are assigned.

"(material excised from the original)"

21.0 DEFINITIONS

The following terms have the meaning stated wherever used in this Agreement.

21.1 The probationary period of an Employee is the first six (6) months of his employment.

21.2 A regular Employee is one hired for indefinite tenure, not limited at time of hire by a stated term or for a specific project.

21.3 A temporary Employee is one hired for a specific project or definite period, in either event not exceeding six (6) months, with such limited period of employment stipulated at time of hire.

21.4 A casual Employee is one employed in a non-bid classification other than a Journeyman who has no regularly established work week, whose days or hours of work are not fixed, and who works solely on call. Such employees shall be employed only as a Hydro Maintenance Man; as a Groundman as provided in Section 16.3.9; or as a Meter Reader, as provided in Section 17.12.1.

21.5 A full-time Employee is one whose regular work week is forty (40) hours.

21.6 A part-time Employee is one whose regular work week is less than forty (40) hours.

"(material excised from the original)"

ARTICLE 37
CASUAL EMPLOYEES

Section 1. The Company may employ casual employees in the Production Department on a daily basis. Casual employees will not be employed during the regular workweek (Monday through Friday) during any week in which regular employees on layoff have not been offered five (5) days work opportunity. Provided that, if circumstances occur on a non-repetitive basis which are of an emergency nature, i.e., the situation could not be foreseen and immediate action must be taken to prevent product loss or limitation of production, then the restriction concerning the employment of casuals set forth previously shall not be applicable. Provided further, that should a regular employee on layoff be unavailable or decline recall for absentee replacement pursuant to Article 3, Section 6, the Company may call a casual and the restriction concerning the employment of casuals set forth previously shall not be applicable. Claimed abuse shall be subject to the grievance procedure.

The Company may employ casual employees on holidays and weekends consistent with the provisions of Article 10, Section 5(A)(4).

Section 2. RECALL

(1) All casual employees shall be considered probationary for the first forty (40) days worked, and shall be worked in accordance with their date of hire. Upon completion of their probationary period, such employees

shall be credited with recall rights in the casual classification as of the date they complete the probationary period.

(2) Casual employees may be worked on a regular work day, consistent with their casual recall status, and the provisions of Section 1 of this Article. Casual employees' work on a weekend or holiday is governed by the provisions of Article 10, Section 5.

(3) Recall rights in the casual classification shall be lost by:

(1) Quit or discharge
(2) Layoff in excess of one (1) year
(3) Unavailability for work for three (3) assignments

"(material excised from the original)"

ARTICLE XVIII

Casual and Temporary Employees

1. Temporary employment is continuous, regularly scheduled, predictable employment of less than six (6) months' duration, and can be full-time or part-time.

2. Casual employment is discontinuous and irregularly scheduled employment and can be full-time or part-time.

3. Temporary and casual employees are not covered by this Agreement.

4. No casual or temporary employee shall be used in a position previously occupied by a Staff Member which has been vacated, unless (i) the position has been posted and the hiring of a permanent replacement is in process, or (ii) the University determines that the position need be covered only on a discontinuous and irregularly scheduled basis, or on a temporary basis as defined in paragraph 1 above. Every month the University will send the Union a list of all casual and temporary employees showing names, work units, and starting dates.

5. No temporary position shall continue for more than six (6) months, and no temporary employee shall be used in the same budgetary unit for more than six (6) months during any twelve (12) month period (except as a substitute for a Staff Member on a leave of absence).

6.(a) No position (as limited by the following sentence) in any budgetary unit shall be filled by hiring a casual employee for more than twenty (20) weeks during any twelve (12) month period. It is understood that if two (2) or more Staff Members hold the same job title in a work unit within the budgetary unit and/or perform the same or similar work, the work performed by such Staff Members shall be considered only one position for purposes of applying the preceding sentence.

(b) No casual employee shall be used in the same budgetary unit for more than twenty (20) weeks during any twelve (12) month period.

7. The use of casual employees or temporary employees may, however, exceed the limitations stated in paragraphs 5 and 6, either (i) by agreement with the Union or (ii) if such extended use does not have the effect of avoiding the creation of a regularly scheduled position and/or denying the opportunity for additional straight-time hours for qualified Staff Members in the same work unit.

8. Presently employed casual and temporary employees who have been working in the same budgetary unit for more than one (1) calendar year in circumstances which violate the guidelines in paragraphs 5 and 6 above shall be made permanent (without posting the positions involved). All other temporary or casual positions which now violate such guidelines, or which in the future reach the limitation of those guidelines, shall be posted as permanent positions, or the work shall be terminated.

9. Except for student employment, the above definitions and limitations shall apply to all temporary and casual employment involving the kinds of work normally performed by Staff Members.

"(material excised from the original)"

(e) There shall be established and maintained within each Hospital, a pool of casual part-time nurses employed by the Hospital to be utilized to supplement the full and regularly scheduled part-time staff. A less than minimal hours nurse shall be called or scheduled to work in a manner mutually agreeable between the nurse and the Hospital. A less than minimal hours nurse is not assured the availability of work on a regular continuing basis; but a less than minimal hour nurse is not obligated to report to duty each time he or she is requested to work. Less than minimal hours nurses may be assigned a station unit or may be utilized to float among station units. To maintain less than minimal hours status, a nurse shall not be unavailable to work for a period greater than two (2) consecutive months unless such nurse requests and is granted a leave of absence.

If a nurse transfers to a less than minimal hours status, he or she shall accrue no additional vacation or sick leave benefits. Such benefits or credited time toward these benefits shall be maintained on the nurse's record and restored to the nurse at such time as he or she transfers back to full-time or regularly scheduled part-time or casual status.

Less than minimal hours nurses shall receive salary increments as described in Carts A and B on the basis of one (1) year's service for each two thousand eighty (2,080) compensated hours.

A less than minimal hours nurse shall be given a minimum of two (2) hours advance notice of the cancellation of any shift of work for which the nurse has agreed to work.

(f) Except as otherwise expressly limited or qualified by this Section 5, or another section of this Contract Agreement, a less than full-time nurse shall be entitled to the benefit of the other sections of this Agreement.

"(material excised from the original)"

(c) Regularly scheduled part-time nurses shall be eligible for the benefits below if they are willing to share weekend duty with the full-time staff and to share proportionately relief and night duty with the full-time staff:

(1) Salary increments as described in Charts A and B on the basis of credit for one (1) year's service for each two thousand eighty (2,080) compensated hours.

(2) After completion of one (1) full year of continuous service, vacation benefits as described in Section 9 on a pro-rated basis. The amount of salary to be paid to the nurse will be based upon the average number of compensated hours per two (2) week payroll period during the preceding year.

(3) Regularly scheduled part-time nurses as described in part (c) of this Section 6 who have averaged thirty-two (32) compensated hours or more per two (2) week payroll period will be entitled to sick leave with pay for personal illness. Sick leave will be earned and accumulated in the same manner as provided for full-time nurses in Section 10 of this Agreement prorated on the basis of one (1) sick leave day earned for each 173.3. compensated hours up to the maximum accumulation. The Hospital may request reasonable evidence of such illness. Sick leave will be granted for absences from work only on a day scheduled as a work day.

(d) A change in status from full-time to part-time or from part-time to full-time shall not work a forfeiture of earned benefits. A change in status from full-time to part-time or from part-time to full-time shall not work a loss of credited standing to earn benefits, which benefits are contractually provided in the status to which the nurse has changed. Credited vacation standing earned as a part-time nurse who has changed to a full-time nurse status will be determined on the basis of credit for one (1) year's service for each two thousand eighty (2,080) compensated hours.

(e) There shall be established and maintained within each Hospital, a pool of casual part-time nurses employed by the Hospital to be utilized to supplement the full and regularly scheduled part-time staff. A casual

part-time nurse shall be called or scheduled to work in a manner mutually agreeable between the nurse and the Hospital. A casual part-time nurse is not assured the availability of work on a regular continuing basis; but a casual part-time nurse is not obligated to report to duty each time she or he is requested to work. Casual part-time nurses may be assigned a station unit or may be utilized to float among station units. To maintain casual part-time status, a nurse shall not be unavailable to work for a period greater than two (2) consecutive months unless such nurse requests and is granted a leave of absence.

If a nurse transfers to a casual part-time nurse status, she or he shall accrue no additional vacation or sick leave benefits. Such benefits or credited time toward these benefits shall be maintained on the nurse's record and restored to the nurse at such time as she or he transfers back to full-time or regularly scheduled part-time status.

Casual part-time nurses shall receive salary increments as described in Charts A and B on the basis or one (1) year's service for each two thousand eighty (2,080) compensated hours.

A casual part-time nurse shall be given a minimum of two (2) hours advance notice of the cancellation of any shift of work for which the nurse has agreed to work.

(f) Except as otherwise expressly limited or qualified by this Section 6, or another section of this Contract Agreement, a part-time nurse shall be entitled to the benefit of the other sections of this Agreement.

"(material excised from the original)"

(c) Casual-Regular Employee. Casual-regular employees are regularly scheduled at least one (1) day per week but less than four (4) days per week.

(d) Casual-Temporary Employee. Casual-temporary employees are scheduled to accommodate a specific period of expanded activity, i.e., summer season and holidays.

(NOTE: Casual-regular and casual-temporary employees are not covered by this Agreement.)

SECTION 6. Utilization of Casual Employees.

(a) Summer Season. Casual-regular and casual-temporary employees may be used for an expanded schedule of four (4) or more days per week and twenty (20) hours or more per week during the summer season which is deemed to begin with the week which contains March 1st, and to end with the week which contains August 31st. For this purpose a week is deemed to begin with the first shift on Sunday and to end with the third shift on Saturday.

(b) Other expanded activity. A casual-regular and casual-temporary employee may be used for expanded schedules such as holiday periods for four (4) or more days per week and twenty (20) or more hours per week not to exceed thirty (30) calendar days for each period.

"(material excised from the original)"

5.04 PART-TIME EMPLOYEES AND SHORT-SHIFT EMPLOYEES. Three to eight hours shall constitute the normal straight-time workday for part-time and short-shift premium employees. Any shift of six hours or more shall include a paid thirty-minute meal period, which period shall constitute time worked for the purpose of determining when overtime is due. Any work in excess of eight hours per day or forty hours per week and any time worked on the seventh consecutive day of the week shall be compensated for at one and one-half the straight-time rate of pay.

5.05 CASUAL EMPLOYEES. Casual employees may be assigned to shifts of not less than three hours except for employees who serve special functions, who may work shifts of two hours or more. Any work in excess of eight hours per day or forty hours per week shall be compensated for at one and one-half times the straight-time rate of pay.

5.06 SPLIT SHIFTS. Except for employees who serve special functions, there shall be no split shifts on other than six or eight-hours shifts. No shift may be split more than once in any twenty-four hour period. All split

shifts shall be worked within twelve (12) consecutive hours. Split shifts shall be paid for by adding seventy-five cents ($.75) to the shift pay except that no split shift premium shall apply to employees who serve special functions. No split shifts shall be permitted on shifts qualifying for the night shift premium as specified in Article IV, Section 4.08.

5.07 TIME BETWEEN SHIFTS. No employee may be scheduled to report within ten hours of the time of completion of the previous day's shift unless paid at time and one-half for the hours worked within the ten-hour elapsed time period.

5.08 DAYS OFF. The Employer shall post in a conspicuous place in the employees' service area a job schedule specifying the full name of each employee, each employee's days off and the starting and finishing time for each employee. All regular full-time employees shall be scheduled off on at least two full days per week. The two days off shall be scheduled consecutively, provided that in any week where the employee receives two days off on a nonconsecutive basis he or she shall be paid one-half day's pay extra as penalty for nonconsecutive days off, except where employees have volunteered to work overtime and volunteered to work special functions. All part-time and short-shift employees shall be scheduled off at least one full day per week.

("material excised from the original)"

SECTION 5. CLASSES OF EMPLOYEES

5.a Regular full-time employees as referred to in this agreement are those employees whose jobs require that they normally work regularly on a consecutive weekly schedule for thirty (30) or more hours per week on an annual basis and who are available and can be scheduled for work on any and all shifts and at all hours. All sections of this agreement shall apply to regular full-time employees.

5.b Regular part-time employees as referred to in this agreement are those employees whose jobs require that they normally work regularly on a consecutive weekly schedule for twenty (20) or more hours per week but less than thirty (30) hours per week on an annual basis and who are available and can be scheduled for work on any and all shifts and at all hours. All sections of this agreement shall apply to regular part-time employees.

5.c Casual employees as referred to in this agreement are those employees who normally work less than twenty (20) hours per week on an annual basis and/or by reason of being a student, or for any other reason, are not available or cannot be scheduled for work on all shifts and at all hours. Casual employees who are students and work only during their vacations may be paid up to fifteen cents (15¢) per hour less than the job rate but not less than the statutory minimum wage rate.

5.d Employees shall, at the time of hire, be designated to be in one of the three classes of employees, depending upon the nature of the job and the availability of the employee. At any time, in the event of a dispute as to whether or not a job is regular or full-time, regular part-time, or casual, that matter shall be processed under the grievance procedure. In the event a job is posted for one class of employees and at the later date it is found to be for another class of employee, the job shall be re-posted.

5.e The term "on an annual basis" as used herein has reference to particular jobs considering an entire year of a Hotel's operations. Therefore, a person classified as a regular part-time employee does not become a regular full-time employee by merely working a number of weeks at one or more periods during the year for more than thirty (30) hours per week. When an employee has worked at a particular job on an annual basis of thirty (30) hours a week or a particular job becomes such that an employee will be required to work regularly on a consecutive weekly schedule for more than thirty (30) hours a week on the basis of an entire year of Hotel operations, then such job will be reclassified as a regular full-time job and shall be posted. However, jobs occupied for one (1) or more years, which are designated for another class of employee, need not be posted.

5.f It is understood that reference to hours in this section is related only to the matter of the definitions of classes

of employees and in no way refers to maximum work opportunity.

"(material excised from the original)"

6.03 REGULAR FULL-TIME EMPLOYEES. Six, seven or eight hours, (which includes a thirty-minute paid meal period) shall constitute the normal workday for regular full-time employees. Any work performed in excess of 8 hours per day, 40 hours per week, or on the sixth day of the workweek shall be compensated at one and one-half (1-1/2) times the normal straight-time rate of pay. Any work performed on the seventh day in the workweek shall be compensated at double (2) the normal straight-time rate. The overtime provisions for work on the sixth or seventh days of work shall not apply when such overtime is caused by schedule changes. The 30-minute paid meal period shall constitute time worked for the purpose of determining when overtime is due. As an exception to the provisions of this paragraph, bartenders may be scheduled for eight-hours without providing a paid meal period, subject to the payment of $.125 per hour premium pay for no relief. The workweek shall start at 12:01 a.m. Saturday and end at 12 midnight the following Friday. Except where business conditions require, no employee shall be scheduled for more than five (5) consecutive days.

6.04 REGULAR SHORT-SHIFT EMPLOYEES. Three to eight hours shall constitute the normal straight-time workday for regular short-shift employees except for banquet department employees, who may work shifts of two hours or more. Any shift of six hours or more shall include

a paid thirty-minute meal period, which period shall constitute time worked for the purpose of determining when overtime is due. Any work in excess of eight hours per day or forty hours per week and any time worked on the seventh day of the work week shall be compensated for at one and one-half (1-1/2) the straight-time rate of pay.

6.05 CASUAL EMPLOYEES. Casual employees may not be assigned to shifts of not less than three hours except for banquet department employees, who may work shifts of two hours or more. Any work in excess of eight hours per day or forty hours per week shall be compensated for at one and one-half (1-1/2) times the straight-time rate of pay.

("material excised from the original)"

RECOGNITION

2.1 The Hospital recognizes the Union as the exclusive bargaining agent with respect to wages, hours, and other terms and conditions of employment for all environmental aides, environmental specialists, dietary workers, laundry workers, transport specialists, elevator operators, maintenance employees, central service technical assistants, nursing attendants, psychiatric aides, community health aides, lab helpers, operating room attendants, mail room clerks, unit clerks, and geriatric technicians. The unit specifically excludes supervisors, temporary and casual employees, regular part-time employees normally working less than

seventeen (17) hours per week, and all other employees of the Hospital

2.2 Unless the context clearly indicates otherwise, the term "employee" as used in this Agreement means only a person employed by the Hospital in the bargaining unit described in Section 2.1.

("material excised from the original)"

Part I. SURVIVOR BENEFIT INSURANCE FOR EMPLOYEES

Section 1. Eligibility:

All employees of the Company who are in a job classification represented for collective bargaining purposes by

"(material excised from the original)"

and who are credited with one or more years' service are eligible for Survivor Benefit Insurance under this Plan.

For the purpose of determining eligibility, the term "employee" means a person who is regularly performing the duties of an established full-time job or position, but does not include persons working on a temporary, part-time or casual basis. The status of employee as defined herein will continue while the individual is absent from work to the extent determined by the Company in accordance with its regulations.

"(material excised from the original)"

9.3 Minimums

Employees who have seniority with their Employer and who are ordered to report to work on any day other than Saturday, Sunday, and holidays and who do so at the specified time shall receive a minimum of eight (8) hours' work, or if eight (8) hours' work is not furnished, a minimum of eight (8) hours' pay at the straight-time rate. Employees having seniority who are ordered to report for work on Saturday, Sunday, and holidays and who do so at the specified time shall receive a minimum of four (4) hours' work, or if four (4) hours' work is not furnished a minimum of four (4) hours' pay at the applicable rate; provided, however, that such minimums on Saturdays and Sundays are not applicable to continuous shift workers whose regularly scheduled days off shall be substituted for Saturdays and Sundays.

All other employees, including casuals, who are called by the Employer to report for work on any day other than Saturdays, Sundays, and holidays shall receive a minimum of either eight (8) hours' work or work for the balance of the regularly scheduled shift upon which they report, whichever is less. Employees not having seniority with their Employer, including casuals, who are ordered to report to work on Saturdays, Sundays, and holidays and who do so at the specified time shall receive a minimum of four (4)

hours' work or if four (4) hours' work is not furnished a minimum of four (4) hours' pay.

If an extra worker is called by the Employer to report for work, and, upon reporting, finds that his services are not needed, he shall receive two (2) hours' pay. Workers reporting for work who are unacceptable to the Employer shall receive no pay.

"(material excised from the original)"

Section 2. Hiring Hall standards

"(material excised from the original)"

and the Union recognize the necessity of having available at all times a supply of competent employees with experience in the scavenger industry in the geographical area.

a. There shall be a Pool of casuals established to cover absentees. This Pool shall consist of not more than twenty-five (25). The Purpose of the Casual Pool is to break in on garbage collection routes, and shall be used in filling unscheduled vacancies before notifying the Union or its Hiring Hall. The list of the Pool casuals will be mutually agreed to between the Company and the Union. Casual pool employees will be required to pay the current Hiring Hall fee for any month in which they work. The Union will provide signed authorizations for each employee in connection with Article 21.

Except in case of emergency, the Company shall advise the Union three (3) working days in advance of the name of any person that the Company intends to add to or delete from the casual pool list. Except upon objection by the Union for good cause shown, the Company shall be free to make such additions or deletions upon completion of the three (3) working day period.

b. Whenever the Employer requires regular workmen, he shall notify the Union or its Hiring Hall, stating the location, the type of work to be performed and the number of workmen required.

"(material excised from the original)"

20.533 Men checked in for work who refuse any work opportunity offered in their category (skilled, unskilled) will not be given availability credit. EXCEPTION: Dock preference men shall be exempt from work on ship.

20.5331 In addition to Section 20.533 above, a Class "A" registered man will be deemed unavailable if he did not accept work when work was available to him and a Class "B" man or a casual was employed in his category (skilled or unskilled) on his assigned shift during the Monday-Friday period. A Class "B" registered man will be deemed unavailable if he did not accept work when work was available to him and a casual was employed on his assigned shift during the Monday-Friday period.

20.5332 The reference to 'category (skilled or unskilled)' in

Sections 20.533 and 20.5331 means that a skilled man is required to accept only skilled work for which he is qualified unless Section 20.7241 is applicable. Unskilled men are required to accept any unskilled work.

"(material excised from the original)"

Article 4
PER DIEM NURSE

A. DEFINITION

1. This Article sets forth the terms and conditions of Per Diem Nurse employment. Requirements for maintaining Per Diem Nurse status are established by the University, and may vary at each location. Per Diem Nurses are those employed in University title codes 9119, 9121, 9122 and 9160. Per Diem Nurses are neither career nor casual employees. Standards of the University's position descriptions must be met as follows:

9119 -	Per Diem Nurse - Clinical Nurse II
9121 -	Per Diem Senior Nurse Anesthetist - Senior Nurse Anesthetist
9122 -	Per Diem Nurse Anesthetists - Nurse Anesthetist
9160 -	Per Diem Nurse Practitioner - Nurse Practitioner II

Per Diem Nurse work assignments add to or substitute for career and casual nursing staff on a pre-scheduled basis or as needed on a day-to-day basis, as determined by the University. Per Diem Nurses may be scheduled or not scheduled, or called off from a pre-established schedule. Additionally, a Per Diem Nurse's eligibility for scheduling may be discontinued at any time at the sole discretion of the University and without recourse to the grievance and arbitration procedures of this Agreement.

2. Per Diem Nurses are not eligible for shift differential or for benefits under Article 16, Benefit Coverage. Per Diem Nurses are not eligible for paid time off such as vacation, sick leave, holidays, leaves of absence, or educational leave. At the mutual agreement of the University and the Per Diem, Nurse, her/his Per Diem Nurse status may be temporarily held in abeyance.

B. COVERAGE

Per Diem Nurses are covered by the following Articles of this Agreement: Recognition, Nondiscrimination in Employment, Practice Committee, Management Rights, Job Posting, Release Time, Work Rules, Per Diem Nurse, No Strikes, Severability, Waiver,

Duration, Overtime Eligibility, Dues Deduction, Nurse Lists, Access, Health and Safety, Assignments, Indemnity, and the related portion of the Salary Article. Per Diem Nurses may use the grievance and arbitration procedures of this Agreement only with respect to alleged violations of those Articles by which they are covered.

"(material excised from the original)"

(2) Employees who are not eligible for regular coverage shall for the purposes of this Section 16.2 be called "casual employees." The Employer will pay a stipulated sum for each straight-time hour worked by such casual employees (and for each straight-time hour worked by employees who are working as casuals while on extended coverage), such agreed sum per hour to be computed to the nearest One-fourth Cent (1/4¢) by dividing by 173.3 the monthly contribution required for regular coverage. Such hourly sum shall be collected by the Association from its members each month.

These funds will first be used for the purpose of providing extended coverage for those employees eligible for such coverage under the provisions of this Section 16.2. Any balance remaining will constitute Trust reserves, the application of which will from time to time be mutually determined by the Association and the Union.

The sums so collected by the Association may be combined with like sums collected from non-Association

employers if necessary to effect any application which is mutually agreed upon, provided that monies paid by such other employers with respect to such casuals shall be at rates not less than the same rate as is paid by the Association members for each hour worked.

The Employer may if he wishes place a casual employee under regular monthly coverage upon commencement of employment or prior to his eligibility date for regular coverage, in which event the required hourly contributions for such casual employee shall cease upon the date on which such regular coverage is made effective for the employee.

An employee eligible for regular coverage who by virtue of having two (2) or more years' seniority with his Employer at the time of his layoff receives extended coverage from the Trust fund shall not be eligible for more than four (4) months of such extended coverage in any twelve (12) month period irrespective of the number, frequency, or length of his layoff periods. If the cost to the Trust of extended coverage for laid-off employees, as herein provided, becomes excessive in the opinion of either the Union or the Association, the provisions for extended coverage shall be subject to renegotiation at the request of either party.

"(material excised from the original)"

ARTICLE II
MANAGEMENT AND UNION RELATIONS

"(material excised from the original)"

Section IV

The Union and the College will not engage in subterfuge for the purpose of defeating or abating the provisions of this Agreement. College shall maintain a "casual" list of employees from which temporary vacancies can be filled who will not accumulate seniority unless employed continuously for a period of ninety (90) days.

"(material excised from the original)"

Section 5. Notification

(a) Casual Employees. For casual employees who work on broken time or day to day basis for various employers, the Local Hiring Hall shall immediately supply such help to the Employer upon notice by the Employer that such casual employees are needed. In the event such casual help is not immediately available or the Local Hiring Hall is closed, the Employer may then hire such casual workers from any other available source.

The Employer shall hire all casual or extra help in accordance with the terms of the hiring procedure outlined in the Local Union territorial jurisdiction where the work is performed. However, where there is a heavy demand for casual or extra helpers in areas where loading and unloading is done, such casual or extra helpers may be permanently assigned to such areas.

"(material excised from the original)"

Lamperson Fruit & Produce
Account No. 4629200-0103
Audit Period: 9/28/80-9/24/83
Meeting with Local Re: Contract

On 11/9/83 Connie Borek & Carol Evans visited local 688. Lamperson's business agent, Charles Bryson, was not in so we met with Rick Duffy, a business agent who used to handle the fruit & produce contract. Per Rick Duffy:

1. The owners of the companies did not negotiate the contract and generally do not understand the contract. /phone log with produce assoc. atty who negotiated the contract is at A7.2

2. There is no limit to the number of casual employees compared to regular employees.

3. Produce Row has had many labor problems.

4. Casual employees can receive pay at a higher rate than what's specified in the contract & casuals can work full time for a long period of time (for example 10 years) without becoming regular.

5. The employer decides who & how many employees they want to hire as casuals & how many employees they hire as regulars.

6. Casual employees pay union dues. We visited the business office at _____ not find any _____

dues paid by casual employees
_____ Lamperson

/s/ Carol K. Evans Prepared by

/s/ Constance Borek 11/83 Reviewed by

Meeting with Local Re: Contract 382

11/11/83 A10.6

TELEPHONE CONVERSATION: 0407-10-04
PREPARED BY: Carol Evans

DATE: 11/10/83 TIME: 10:30
RE: (COMPANY NAME) Lamperson Fruit
ACCOUNT NO: 4629200-0103
INCOMING: X OUTGOING: 314 658 5747
SPOKE TO: Charles Bryson
OF: Local 688
LENGTH OF CONVERSATION:
Casual vs. Regular - Casuals don't necessarily work full time But it is possible for casuals to work full time for a period of years. I asked then how could I distinguish between the two. He said casuals are hired as casuals & regulars get pension contributions paid on them. Casuals pay union dues. He will have a list ready in room 210 for Connie to pick up when she's down on Monday. He said if there are employees other than whats on the casuals list or dues check off they could be "swamper" (people who hang around & work, but haven't been caught by the local). Also, Brison said a casual can become regular to replace someone who left permanently. There is no required amount or limit of regulars & casuals.

12/18/80 jls

info to A2.4½ 2/2 383